Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MYRON G. KING, PETITIONER

v.

PENSION TRUST FUND OF THE PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY AND JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ERISA requires plan administrators to respond truthfully to questions from plan participants, and to provide accurate copies of specified plan documents in response to written requests. In addition, ERISA prohibits plan amendments that "cut back" the value of accrued pension benefits or "backload" pension benefits by valuing disproportionately a participant's later years of service. ERISA's regulations test for violations of these provisions by questioning whether a plan amendment has these prohibited effects on the pension benefits of *any* plan participant. The questions presented are:

1. Must a pension plan participant prove "reliance" or "likely prejudice" to prevail against a plan administrator who breached its fiduciary duty to provide accurate information and documentation in response to that participant's written requests?

2. Does a participant who is injured by a plan amendment that violates ERISA's anti-cutback and backloading provisions have standing to contest its lawfulness, or is standing limited only to those who can demonstrate these violations with respect to their own pensions?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 19

CONCLUSION 29

APPENDIX

Circuit Court Opinion 1a

District Court Order Disbursing Funds 5a

Circuit Court Order Denying Rehearing 46a

Relevant Provisions 47a

TABLE OF AUTHORITIES

CASES

AIKEN V. POLICY MGMT. SYS. CORP., 13 F.3D 138, 141-42 (4TH CIR. 1993) (PER CURIAM) 21

ALLEN V. WRIGHT, 468 U.S. 737, 7[illegible] (1984) 27

ANDERSEN V. CHRYSLER CORP., 99 F.3D 846, 859 (7TH CIR. 1996) 21

BLUM V. YARETSKY, 457 U.S. 991, 999 (1982) 26, 27

BRANCH V. G. BERND CO., 955 F.2D 1574, 1578-79 (11TH CIR. 1992) 21

BURKE V. KODAK RETIREMENT INCOME PLAN, 336 F.3D 103, 112 (2D CIR. 2003) (EMPHASIS IN ORIGINAL), CERT. DENIED, .540 U.S. 1105 (2004) 21, 23

CENTRAL LABORERS' PENSION FUND V. HEINZ, 541 U.S. 739, 743 (2004) 5

CHILES V. CERIDIAN CORP., 95 F.3D 1505, 1519 (10TH CIR. 1996) 21

COLLINS V. AM. CAST IRON PIPE CO., 105 F.3D 1368, 1371 (11TH CIR. 1997) 21

EDWARDS V. STATE FARM MUT. AUTO. INS. CO., 851 F.2D 134, 137 (6TH CIR. 1988) 21

FINANCIAL INST. RET. FUND V. OFFICE OF THRIFT SUPERVISION, 964 F.2D 142, 147 (2D CIR. 1992) 29

GLUCK V. UNISYS CORP., 960 F.2D 1168, 1179 (3D CIR. 1992) ... 28

GOVONI V. BRICKLAYERS, MASONS & PLASTERERS INT'L UNION OF AM., LOCAL NO. 5 PENSION FUND, 732 F.2D 250, 252 (1ST CIR. 1984) 21

GREAT-WEST LIFE AND ANNUITY INS. CO. V. KNUDSON, 534 U.S. 204 (2002) 24

GRIDLEY V. CLEVELAND PNEUMATIC CO., 924 F.2D 1310, 1319 N. 8 (3RD CIR. 1991) 21

HANSEN V. CONT'L INS. CO., 940 F.2D 971 983 (5TH CIR. 1991).. 21

INTERNATIONAL UNION OF ELECTRONIC, ELEC., SALARIED, MACH. & FURNITURE WORKERS V. MURATA ERIE N. AM., INC., 980 F.2D 889 (3D CIR. 1992) 28

JOHNSON V. ALLSTEEL, INC., 259 F.3D 885 (7TH CIR. 2001) 26, 27

LARSON V. NORTHROP CORP., 21 F.3D 1164 (D.C. CIR. 1994)..... 29

MERTENS V. HEWITT ASSOCS , 508 U.S. 248, 251 (1993) 3

PALMISANO V. ALLINA HEALTH SYS., INC. 190 F.3D 881, 887-88 (8TH CIR. 1999) 21

PILOT LIFE INS. CO. V. DEDEAUX, 481 U. S. 41, 55-57 (1987)..... 7
VARITY CORP. V. HOWE, 516 U.S. 489, 506 (1996)..... 4, 6, 20, 24

WARTH V. SELDIN, 422 U.S. 490, 500 (1975) 29

ZIEGLER V. CONNECTICUT GEN. LIFE INSURANCE CO., 916 F.2D 548, 551-52 (9TH CIR. 1990) 28

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1001(a) 3

29 U.S.C. § 1001(b) 3, 6

29 U.S.C. § 1002(16)(A) 7

29 U.S.C. § 1022 4

29 U.S.C. § 1024(b)(4) 4, 15, 20, 25

29 U.S.C. § 1054(b) 5

29 U.S.C. § 1054(b)(1)(A) 18

29 U.S.C. § 1132 6

REGULATIONS

26 C.F.R. § 1.411(d)-3(b) 26

PETITION FOR A WRIT OF CERTIORARI

Myron G. King respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Petitioner includes the unpublished orders denying rehearing or hearing *en banc* in the Appendix (App. 46a)[1]. The opinion of the court of appeals panel is reported at 131 Fed. Appx. 740 ((App. 1a-4a). The opinion of the district court is reported at 31 Employee Benefits Cas. (BNA) 1671 (E.D.N.Y. 2003)(App. 5a-45a).

JURISDICTION

The court of appeals filed its summary order affirming the district court on February. 22, 2005. It denied a timely petition for rehearing and hearing *en banc* on June 1, 2005. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved are reproduced in the Appendix. The statutes involved are ERISA §§ 104(b)(4), 502(a)(1), (a)(3),(c), 504(b) and (g).

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[1] References to the Appendix to this Petition will be denoted as "App. __," with the appropriate page of the appendix inserted. References to the Special Appendix of the Brief of Appellant and Special Appendix, filed with the Second Circuit Court of Appeals, will be denoted as "SPA__." References to the Joint Appendix filed with Second Circuit will be denoted as "JA-__."

STATEMENT OF THE CASE

Petitioner Myron G. King sued for vested pensions benefits owed to him by Respondent Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry (the "Plan"). Petitioner also sought to redress a breach of fiduciary duty by Respondent Joint Industry Board, the Plan Administrator (JA-10-18). This case asks this Court to determine the elements necessary to establish fiduciary liability by a plan administrator who provides misleading information to a plan participant. Appellate courts are conflicted regarding whether a participant must prove reliance upon, or merely likely prejudice resulting from, that false statement. In addition, this case considers the standing of a plan participant to challenge the lawfulness of a plan amendment expressly relied upon by the Plan to deny him pension benefits.

This Court should grant the writ of certiorari in this case because the Second Circuit panel decision insulates plan administrators from liability for providing false information absent proof of reliance. That holding undermines Congress' mandate that plan fiduciaries accurately inform participants of their rights and benefits. The Second Circuit's decision also narrows the category of participants with standing to contest the lawfulness of plan amendments that affect their pension benefits, thereby increasing the likelihood that amendments that violate ERISA, and threaten the integrity of pension plans, will remain effective.

A. Statutory Background

1. Plan Requirements and Fiduciary Duties

Congress enacted ERISA in 1974 in response to its finding that "owing to the lack of employee information and adequate safeguards concerning [retirement plans], it is desirable...that disclosure be made and safeguards be provided with respect to the establishment operation, and

administration of such plans..." It found further that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans..." ERISA § 2(a), 29 U.S.C. § 1001(a).

By enacting ERISA, Congress sought to protect ... participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

ERISA mandates that pension plans regularly make specified disclosures to the Government and plan participants. The Act specifies certain requirements pension plans must satisfy in terms of the vesting, accrual, and payment of pension benefits. To ensure compliance, it created an enforcement mechanism that permits both private parties and the Government to sue for specified violations of ERISA. "ERISA is, we have observed, a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993).

ERISA requires plans regularly to disclose material information to their participants by means of Summary Plan Descriptions, or SPDs. ERISA § 102 specifies that an SPD must include: (1) the name and type of administration of the plan; (2) the name and address of the administrator; (3) the names of the trustees and their addresses; (4) the plan's requirements respecting eligibility and benefits; (5) a description of provisions providing for nonforfeitable pension benefits; (6) circumstances that that may result in disqualification, ineligibility, denial, or loss of benefits;(7)

the claims procedure; and (8) the procedure to appeal a plan determination. 29 U.S.C. § 1022.

Congress recognized, however, that an SPD may be too cursory to contain all of the information necessary for a participant to understand how the plan functions and to determine benefit entitlements. Accordingly, ERISA §104(b)(4) provides that plan administrators "shall, upon written request of any participant or beneficiary, furnish a copy of ... the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract or the instruments under which the plan is operated." 29 U.S.C. § 1024(b)(4). Particularly in light of Congress' concern in enacting ERISA, a plan administrator must respond truthfully to a participant's questions regarding the terms of the plan:

> ERISA requires a "fiduciary" to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA § 404(a). To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act "solely in the interest of the participants and beneficiaries." As other courts have held, "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."

Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (quoting *Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983)).

Congress also protected the "anticipated retirement benefits" of plan participants by enacting minimum vesting and accrual requirements, and prohibiting plans from retroactively reducing vested pension benefits. It intended that the minimum vesting standards provide employees, after a specified number of years, with a nonforfeitable interest in amounts deriving from an employer's contribution.

Employees who leave employment covered by that pension plan after they have vested, but before they reach retirement age, thus can anticipate receiving pension benefits. J. Langbein & B. Wolk, *Pension and Employee Benefit Law* 121 (3d ed. 2000) ("The central problem to which ERISA is addressed is the loss of pension benefits previously promised").

Congress recognized that even vested benefits would mean little, and provide an illusory basis for retirement planning, if plans could cut them back after vesting, or if vested benefits accrued so slowly that an employee would forfeit the lion's share by leaving covered employment before retirement. This Court explained the importance of ERISA's anti-cutback provision as follows: "[W]hen Congress enacted ERISA, it 'wanted to make sure that that if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Thus, ERISA protects retirement benefits by means of its "anti-cutback" rule, which prohibits a plan from reducing the value of accrued pension benefits, except for a narrow set of circumstances not relevant to this case. *Id.* at 744 ("ERISA's anti-cutback rule is crucial to this object"). Likewise, ERISA's "anti-backloading" provision prohibits a plan from disproportionately valuing later years of service, thereby minimizing the vested benefits of those who leave covered employment before retirement. ERISA §§ 204(b) and(g), 29 U.S.C. §§ 1054(b) and (g). (App. 47a-55a; 59a-62a).

> Congress saw that if benefits were required to accrue, but allowed to accrue in any manner, defined benefit plans could be designed to backload accrued benefits to later years of service, thereby making pre-retirement vesting ineffective. As the House Ways and Means Committee stated: '[O]therwise a plan

> which wishes to evade the vesting requirements could provide for *de minimis* accruals until an employee's last years of employment, at which point very large accruals would be produced."

S. R. Bruce, *Pension Claims: Rights and Obligations* 112 (2d ed. 1993) (quoting H.R. Rep. No. 807, 93rd Cong., 2d Sess. at 61, 2 ERISA Leg. Hist. 3181).

2. ERISA Enforcement

> One of ERISA's declared policies is to provide "ready access to the Federal courts." as a means of protecting the interests of participants and their beneficiaries in employee benefit plans. Congress recognized that a major weakness of prior federal legislation,..., was the absence of an effective enforcement mechanism—in particular, the absence of a private right of action for plan participants. ERISA addressed this problem by providing an elaborate system for enforcing the requirements of ERISA Titles I and IV and of plan's terms through civil litigation, primarily in the federal courts.

S. Sacher & J. Singer, *Employee Benefits Law* 874 (2d ed. 2000) (quoting ERISA § 2(b), 29 U.S.C. §1001(b)).

ERISA's multifaceted enforcement system provides for both private and government enforcement actions. For example, ERISA § 502(a)(1)(a) authorizes suit by a participant to redress a plan administrator's failure to provide requested information. Section 502(a)(1)(b) permits a participant to sue for benefits or to clarify benefit rights; § 502(a)(3) is ERISA's "catch-all" provision that permits a participant to sue for equitable relief to remedy violations of ERISA plan terms. 29 U.S.C. § 1132 (a). *See Varity Corp.*, 516 U.S. at 507-08 (explaining this comprehensive civil

enforcement scheme). In addition, Congress directed the courts to formulate a federal common law supplementing the express provisions of ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U. S. 41, 55-57 (1987).

B. Factual Background[2]

The Plan is a multi-employer defined benefit pension plan established pursuant to a series of collective bargaining agreements between Local Union No. 3 of the International Brotherhood of Electrical Workers AFL-CIO ("Local 3") and employer associations or individual employers in the electrical industry. The Plan provides pension benefits to retired employees who were covered by Local 3's collective bargaining agreements while working for employers who contributed to the Plan on their behalf. The Plan is thus financed by contributions pursuant to the collective bargaining agreements from the employers and investment income generated from those contributions.

The Plan is governed by and administered in accordance with various plan documents, including the Pension, Hospitalization and Benefits Fund of the Electrical Industry Trust Agreement amended October 1, 1989 (the "Trust Agreement"); the Pension Trust Fund – Pension, Hospitalization and Benefits Plan of the Electrical Industry, as amended effective October 1, 1989 (the "Pension Plan"); and Summary Plan Descriptions which were updated about every three years.

The Joint Board is the administrator of the Plan as that term is defined by section 3(16)(A) of ERISA, 29 U.S.C. § 1002(16)(A). As the administrator, the Joint Board is responsible for the Plan's day-to-day administration,

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[2] This statement of facts is taken nearly verbatim from the "Background" section of the District Court's opinion, included as App. 7a-16a. Petitioner will indicate where the statement of facts departs materially from the District Court's recitation.

including maintaining records, communicating with participants, and calculating benefits in accordance with the Plan terms.

3. Pensions Under the Plan

Generally, a participant's monthly pension benefit is the product of the numbe of Pension Credits he or she has earned and the Pension Credit Rate applicable to each credit. A Pension Credit is earned for each year in covered employment (*i.e.*, each year the participant works for an employer in a position covered by the collective bargaining agreement.

Since at least 1985, the Plan has offered at least three types of retirement pensions: Standard Pensions, Vested Pensions, and Disability Pensions. For example, pursuant to the 1985 Pension Plan document, a participant could retire on a Standard Pension if he or she (i) had attained the age of 55 in Covered Employment, (ii) had at least 20 Pension Credits, and (iii) had been employed by Contributing Employers or been available for employment for at least twenty years prior to the date of application for the pension.[3] Under the terms of the Plan in effect in 1985, a participant who qualified for a standard pension would receive a monthly Standard Pension equivalent to $7.50 times the number of Pension Credits (but not to exceed $250 per month). By contrast, a participant can qualify for a vested pension if they leave the industry after accumulating at least ten years of service.

As of 1985 and as set forth in the 1988 Plan documents, the Pension Credit Rate for Standard Pensions was increased from $7.50 to $8.50. The 1988 Pension Plan provided the same formula determining eligibility to retire on a Standard Pension, but also provided that: "The pension to

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[3] Under the most recent Pension Plan document, a Standard Pension requires the same three criteria except that participant must attain the age of 60 in Covered Employment. 1995 Pension Plan, § 3.03..

which a Participant is entitled shall be determined under the terms of the Plan as in effect at the time the Participant separates from Covered Employment. A participant shall be deemed to have separated from Covered Employment on the last day of work which is followed by a one-year Break in Service."

Between June 28, 1989 and August 13, 1989, the Pension Credit Rate was raised from $8.50 to $24 for retirements effective on or after June 8, 1989 and to $31 for retirements effective on or after June 14, 1990. However, as it increased the Pension Credit Rate, the Plan restricted the applicability of this increase to credits earned prior to 1989 if the participant had left covered employment before 1989. For example, the Summary Plan Description ("SPD") for the Plan dated June 8, 1989, explains that a vested pension will be calculated based on the applicable credit rate to the year in question:

> For participants withdrawing from the industry on or after June 8, 1989 who were to receive the "A" rate of pay as specified in the Collective Bargaining Agreement, the monthly Vested Pension benefit, payable at age 65, is calculated by multiplying the number of Pension Credits earned by the participant during the Years of Vesting Service times $24. ... A participant who withdrew from the electrical industry at any time prior to June 9, 1989 will be entitled to a monthly benefit of $8.50 multiplied by the number of Pension Credits, payable at age 65.
>
> ***
>
> A retired participant who returns to work in covered employment for the amount of time equal to the amount of time out of the industry, shall be entitled to have all prior years of service calculated at the unit benefit amount in effect at the time of application for

> pension, providing that the return to work in covered employment exceeds 2 years (3,000 straight time hours). This provision shall also apply to a participant who has withdrawn from the industry.

1989 SPD at 8-9.

One of the main disputes between the parties is whether this same "split-rate" provision regarding Vested Pensions (valuing pre-break credits at the lower rate in effect upon leaving covered employment unless the participant returns to work for a number of years equal to time out of the industry) also applies to Standard Pensions. For example, the section of the 1989 SPD describing standard pensions makes no mention of how to calculate pensions for an employee who leaves and then returns to covered employment. Similarly, the test of the Plan amendment containing the split-rate provision adopted by the Pension Committee on June 28, 1989, stated:

> RESOLVED, that effective as of June 9, 1989 any participant who retires on a vested pension shall receive a pension benefit in the total amount calculated as follows:
>
> 1. for all pension credits earned prior to June 9, 1989 the rate shall be $8.50 per pension credit per month.
>
> – Plus –
>
> 2. for all pension credits earned after June 9, 1989 the rate shall be the rate in effect at the time the participant leaves the electrical industry.[4]

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[4] The minutes of the June 28, 1989 Pension Committee meeting where this amendment was adopted state:

This split rate provision was added formally to the Pension Plan document itself in 1995. In that year,[5] the Pension Plan was revised to incorporate the following language (which is somewhat different from the 1989 amendment):

> Section 4.07. Application of Benefit Increase
>
> Subject to the provision of the last sentence of Section 4.01 hereof. The pension amount to which a Participant is entitled shall be determined under the terms of the Plan as in effect as the time the Participant separates from Covered Employment. For purposes of this Section, a Participant shall be deemed to have separated from Covered Employment on the last day of work. The Pension Credit Rate in effect at the time of a Participant's application for a Pension shall apply to Service Credits earned before a Break-in-Service only if the period worked in

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A situation may occur where an inactive vested participant returns to work in the industry and again the Trustees have options.

a) The Trustees may impose a waiting period of X years whereby a returned participant who works that required number of years will earn all of his benefits at the rate in effect at the time he retires.

b) The Trustees may credit all prior years at the $8.50 rate and credit future years at the benefit rate in effect at the time he returns.

Minutes of the Pension Committee of the Joint Board Meeting Held June 28, 1989, at 2. see also Minutes of the Special Pension Meeting of the Joint Board Held Aug. 31, 1989, at 2 .(summarizing pension committee meeting). The test of the Amendment is notably limited to those participants who retire on a vested pension.

[5] Although the 1995 Pension Plan bears on its face the legend "Amended effective October 1, 1989 except as otherwise indicted ," the witness offered by defendants pursuant to Rule 30(b)(6) stated at his deposition that the Pension Plan bearing that legend was authored in fact "around 1995." ..

> Covered Employment after the Break-in-Service equals or exceeds the period of Break-in-Service. If a Participant returns to such Employment before he suffers two consecutive one year Breaks in Service, he must complete two years of Vesting Service (3,000 straight time hours) subject to his return to such Employment in order to be entitled to any benefit increases which may have become effective after he initially ceased such Employment. If a Participant, having suffered two consecutive one year Breaks-in-Service should subsequently return to such Employment he shall resume the accrual of Pension Credits and the portion of his pension which is attributable to such subsequent employment shall be determined under the terms of the Plan then in effect.

1995 Pension Plan, § 4.07. The 1995 Pension Plan document seems to be the most current fully stated Plan in effect.

The 1995 SPD similarly explains:

> If a participant who is eligible for a Normal, Standard or Early retirement subsequently has one or more years during which a minimum of 1,000 hours are not worked, such participant shall be entitled to one of the previously mentioned retirements upon earning a Year of Vesting Service (working at least 1,000 hours). The unit benefit amount in effect at the time of application of pension shall apply to all prior years of service only if the work in covered employment equals or exceeds the time in non-covered employment. In all cases the return to covered employment must exceed two years (3,000 hours straight time hours).

1995 SPD at 22-23. The 1998 SPD has the same language. 1998 SPD at 22.

After 1989, the Pension Credit Rate was raised at least four more times: in 1990 to $31, in 1992 to $35, in 1995 to $50, and in 1998 to $55.

The district court determined that, despite the Plan's contentions, there was no genuine factual dispute regarding when the split-rate provision was amended to the Standard Pension: "Thus, since the plain language of the 1989 amendment only applied to vested pensions, the 1995 Pension Plan document (which applies the split-rate provision to *all* pension categories including standard pensions) provides the operative time to examine the applicable rate to King's accrued benefits." (App. at 27a)(emphasis in original).

4. Petitioner's Work History

Myron G. King became a member of Local 3 and a participant of the Plan in November 1955. Mr. King worked continuously in employment covered by the pension plan until November 1976 and thus earned 21 pension credits. However, in November 1976, he left covered employment, obtained a license to be an electrical contractor and formed King Electric, Inc. in January 1977. He served continuously as the president of King Electric from 1977 to 1998.

In March 1979, King Electric became a party to the collective bargaining agreement between Local 3 and the New York Electrical Contractor's Association and thus became a contributing employer to the Plan. King Electric continued to contribute to the Plan until 1998, when the company was liquidated in bankruptcy.

In August 1998, Mr. King began working as a journeyman electrician for Allcomm Electric, a contributing employer to the Plan. He worked in this position for one year and earned one additional pension credit. Mr. King retired in 1999, and applied for a Standard Pension. This chart summarizes his relevant work history:

Length of Time	Employer	Covered Employer
Nov. 1995 to Nov. 1976 (21 years)	N/A	Yes
Jan. 1977 to Aug. 1998 (21 years, 8 months)	King Electric	No[6]
Aug. 1998 to Aug. 1999 (1 year)	Allcom Electric	Yes

After being initially informed that he would receive $55 for each year of service King learned that his break in service after 1976 might "constitute a drastic reduction in [his] pension." Letter from Myron King to Pension Committee, dated July 26, 1999, at 1. The pension committee calculated King's pension by determining that he was entitled to 21 credits valued at the pre-1989 $8.50 rate and one pension credit valued at the current rate of $55. Thus, defendants awarded King a standard pension effective September 1, 1999, in an amount of $205.01 per month (which included an approximately 12% reduction for spousal benefits not at issue in this case).

5. Petitioner's Access to Plan Documents

Mr. King disputed the Plan's determination of his pension and requested in writing an explanation. The Joint Board responded by a letter including portions of the 1998 SPD highlighting the language noted above. King appealed the determination. The Plan rejected the appeal on February 24, 2000.

On June 9, 2000, King requested in writing that the Plan provide him with copies of the following Plan

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[6] As noted above, during this time King Electric made no contributions at all from 1977 to 1979, and even after it became a party to the CBA with Local 3, it did not make contributions on Mr. King's behalf from 1979 to 1998.

documents: all resolutions granting benefit increases under the Plan; all amendments to the Plan since 1955; every version of the Plan since 1955; the minutes of all meetings at which King's claim for pension benefits were discussed; and any and all appellate decisions by the Trustee or the Plan Administrator with respect to claims for pension benefits. King requested these documents pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

Mark Chanzis responded in writing, stating that the documents sought were beyond the scope of ERISA § 104(b)(4), and that he believed all documents required by § 104(b)(4) had already been provided. Mr. King then wrote again, asking Mr. Chanzis to reconsider his decision and requesting a copy of the Plan in effect in 1992, since that year's SPD did not describe any split-rate provision for standard pensions. Mr. Chanzis responded by providing a copy of Article IV "from the plan document" including § 4.07, and stated that the "appropriate provision was adopted by the Trustees of the Plan in 1989." (Letter from Chanzis to King, dated September 18, 2000). Mr. Chanzis also stated that he would provide a copy of the entire Plan document upon receiving a check for copying fees, and thereafter produced the 1995 Pension Plan (which [illegible] noted above, bears the legend, "Amended effective October 1, 1989 except as otherwise indicated"). That Plan document bears no other date that indicates when it was created.

Petitioner provides the following summary of his correspondence with the Plan Administrator:

- He first requested a comprehensive list of Plan documents pursuant to ERISA § 104(b)(4),
- The Plan Administrator objected that this request was overbroad, and refused to provide any documents;
- Mr. King again wrote the Plan Administrator, asking it to "reconsider your previous decision." He explained that he was seeking to understand when the

split-rate provision was added to the Plan and that he sought the "1992 Plan," or "if that provision was added to the Plan by amendment...that amendment as well."

- The Plan Administrator did not object that this request continued to remain outside the scope of ERISA § 104(b)(4). Instead, he provided the text of § 4.07, and indicated that "the appropriate provision was adopted in 1989."
- Mr. King wrote the Plan Administrator once more, thanking him for providing an excerpt from the "1992 Plan," and repeating his request "for the entire 1992 Pension Fund Plan Document from which the 1992 Summary Plan Description was adopted," enclosing his check for a copy of the "1992 Pension Plan."
- The Plan Administrator did nothing to correct Mr. King's misunderstanding regarding the document it had provided, but instead provided without comment the entire 1995 Plan document.

6. Plan § 4.07 Cut Back and Backloaded the Pensions of Specific Participants

Mr. King submitted as summary judgment evidence the Plan's pension calculations with respect to two plan participants, whom he dubbed Pensioners #1 and #2. These calculations clearly exhibited how the Plan violated the pertinent regulations regarding cutting back or backloading pension benefits. Mr. King's appellate brief explained this evidence to the Second Circuit panel as follows:[7]

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[7] Brief of Appellant and Special Appendix, at pp. 14-15 (internal citations refer to the record before the Second Circuit). The worksheet describing how the pension benefits of Pensioner #1 was calculated is at JA-863.

> The 1995 Amendment (§4.07) unlawfully cut back the accrued benefits of Pensioner #1. The Plan's 30(b)(6) witness, Mr. Chanzis, acknowledged that this participant left Covered Employment in 1977, after accumulating 19 Pension Credits, and returned in 1990, having had a break in service of "approximately 11 years." (A-855, Chanzis Dep. at 79). By 1992, the Plan's Pension Credit Rate for the Standard Pension was $35. (Order at SPA-7; A 309, 1992 SPD at 6). Thus, in 1992, Pensioner #1 had accrued benefits equal to 21 Pension Credits multiplied by $35, or $735.
>
> Section 4.07, amended to the Plan in 1995, caused the 19 Pension Credits Pensioner #1 earned before 1990 to be devalued retroactively to $8.50. (A 855, Chanzis Dep. at 79) ("...and when the person came in to a contributing employer, he did not put in at least that amount of time [equal to the break in service]. Therefore, the prior years from 1977 and going backwards were valued at the rate of $8.50"). Thus, when this participant retired in 1998, the Plan valued his pre 1977 Pension Credits at $8.50 and awarded him a Standard Pension of $656.50, by applying the prevailing Pension Credit Rate only to the Pension Credits he earned after 1990. (A-863).[8]

Mr. King also demonstrated how the Plan amendment backloaded the pension of Pensioner #2:

> Pensioner #2 (identified as Case #28-ST-12-99, A 864) first accrued 18 Pension Credits. He then experienced a break-in-service of 10.5 years, and returned to Covered Employment in 1986.

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[8] "[A] plan is not a qualified plan if a plan amendment decreases the accrued benefits of *any* plan participant...26 C.F.R. § 1.411(d)-3(b)(emphasis added). App. 81a.

Thereafter, he worked an additional 13 years before retiring. For example, in 1996, he accrued an additional $50 in monthly pension benefits because that was the prevailing Pension Credit Rate under the 1995 Plan.

Next, consider how his accrued benefits increased in 1997, when his return to service exceeded the length of his break-in-service, thereby repairing the break. In that year, he accrued not just another $50, but an additional $747 [18x($50-$8.50)], nearly 15 times the previous year's accrual ($50), because all of his pre-break Pension Credits became "unfrozen." Pensioner #2's monthly pension benefit when he retired was $1,760.42, 45 percent of which accrued just three years before he retired. (A-864). Because of this "spike" in benefits, this Plan is backloaded.[9]

C. Proceedings Below

Petitioner sued the Plan and the Plan Administrator under ERISA §§ 502(a)(1) and (a)(3), and 502(c). He sought a declaration that Plan § 4.07 is unlawful, and asked the court to award him pension benefits based upon the remaining Plan provisions and to strike that unlawful amendment from the Plan. In addition, he asked the court to determine that the Plan Administrator made materially false representations to him, thereby breaching its fiduciary duty. Because that breach consisted of providing the wrong Plan document in

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[9] Brief of Appellant and Special Appendix, at pp. 23-24 (internal citations refer to the record before the Second Circuit. The worksheet describing how the pension benefits of Pensioner #2 was calculated is at JA-864. ERISA § 504(b)(1)(A) expresses the test for backloading in terms of how the plan determines the benefit entitlement of "each participant." 29 U.S.C. § 1054(b)(1)(A); App. 47a.. A plan is backloaded if the accrual rate in one year is more than 33 1/3 percent greater than in a previous year. § 1054(b)(1)(B) (App. 48a).

response to Mr. King's written request, pursuant to ERISA § 104(b)(4), and mislabeling its effective date, that breach is actionable under ERISA § 502(c) (penalizing plan administrators who do not respond within 30 days to a participant's written request for specified plan documents).

The district court ruled on cross-motions for summary judgment. It granted summary judgment in favor of the defendants on all claims, and denied Mr. King's motion for summary judgment. Mr. King timely appealed to the Second Circuit. In an unpublished opinion, a panel affirmed the district court in all respects. The panel affirmed the district court's dismissal of claims against the Plan Administrator because Mr. King failed to rely on its false statements. The panel affirmed dismissal of the cutback and backloading claims as well, holding that Mr. King lacked standing to assert these claims because he could not prove that his own pension was cutback or that he was deterred by the amendment's backloading feature. The panel made these rulings notwithstanding that the Plan expressly relied upon the offending amendment to deny him pension benefits, and that Mr. King had sought a declaration that these terms violate ERISA (as well as an injunction striking these unlawful terms from the Plan). The Second Circuit denied Mr. King's motions for panel rehearing and *en banc* consideration on June 1, 2005. (App. 46a).

REASONS FOR GRANTING THE PETITION

The pensions that Congress intended ERISA to secure for plan participants are only as certain as a participant's right to receive accurate information from plan administrators and access to the courts to remedy ERISA violations. This case affords this Court an opportunity to affirm these principles and clarify important questions regarding the rights of participants effectively to police the terms of their pension plans.

ERISA requires plan administrators to summarize regularly for participants key provisions, including those regarding eligibility for pension benefits and the amount of those benefits upon retirement. Because an SPD necessarily omits details that may be important to participants, ERISA requires plan administrators to respond to written requests by providing certain enumerated categories of documents, and to do so truthfully. This case questions whether the law immunizes a plan administrator of who breaches these duties unless a participant can prove either "reliance" or "likely prejudice" as a result of this breach.

Petitioner also raises the important question of whether only one very narrow category of participants has standing to challenge plan amendments that violate ERISA. This question has particular relevance to defined benefit plans, in which contributions and disbursements affect a common pool of assets (rather than individual accounts). Participants have a common interest in ensuring the integrity of a plan from which they each may draw pensions, and each suffers a common injury if a plan enacts amendments that violate the carefully-crafted rules and regulations designed to protect their benefits.

A. This Court Should Protect Participants From Plan Administrators Who Mislead Them

In *Varity Corp. v. Howe*, this Court recognized a private right of action in ERISA § 502(a)(3) for participants provided with false and misleading information by plan administrators. *Id.* 516 U.S. at 506 ("lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA"). Lower courts have struggled to determine the elements of that claim, with conflicting results. The Second Circuit has succinctly summarized the three-way split among circuit courts, as exemplified by the line of "deficient SPD cases," as follows:

> The Third, Seventh and Eleventh Circuits require detrimental reliance. See *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 n. 8 (3rd Cir. 1991); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992). These courts generally require an affirmative showing by the plaintiff that he read the SPD and that but for the inaccurate description he would have acted differently. *See, e.g., Collins v. Am. Cast Iron Pipe Co.*, 105 F.3d 1368, 1371 (11th Cir. 1997). The First, Fourth, Eighth and Tenth Circuits allow recovery upon a showing of *either* reliance *or* prejudice. *See Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993) (per curiam); *Palmisano v. Allina Health Sys., Inc.* 190 F.3d 881, 887-88 (8th Cir. 1999); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996). The Fifth and Sixth Circuits in *dicta* would require neither reliance nor prejudice. *See Hansen v. Cont'l Ins. Co.*, 940 F.2d 971 983 (5th Cir. 1991); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988).

Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 112 (2d Cir. 2003) (emphasis in original), *cert. denied*, .540 U.S. 1105 (2004).

Undoubtedly, it is in the public interest, and consistent with purpose of ERISA, to identify misstatements in SPDs as quickly as possible and to correct them at the first opportunity. This cure is most efficacious if *no* participant relies upon a misstatement or is prejudiced. For example, within the equitable relief available under ERISA § 502(a)(3) is injunctive relief, which permits a court to halt the

distribution of an erroneous SPD and mandate a plan to substitute a corrected version. The law should encourage such suits, irrespective of the degree of injury to the participant-plaintiff, because they remedy a fiduciary breach by placing accurate information in the hands of plan participants. Whether, and the degree to which, a particular participant actually is, or is likely to be, prejudiced may inform the equitable relief crafted by a court, but it is irrelevant to whether the participant states a claim under ERISA.

This case illustrates why "reliance" cannot be an essential element of a claim for breach of fiduciary duty. Because Petitioner suspected that § 4.07, the amendment upon which the Plan relied on to deny him benefits, cut back accrued benefits, he sought to pin down when the amendment became effective. He requested the 1992 version to determine whether that document would reflect the questioned amendment. The Plan Administrator responded misleadingly, as the district court found, by providing him a version, which included the amendment, that was not authored until 1995, bearing the legend "Amended effective October 1, 1989." If the facts were as the Plan Administrator represented, then no cutback of Plan benefits would have occurred and this lawsuit would not have ensued. In other words, the effect of the false statement in this case, if believed, was to forestall, rather than induce, action by the participant. As the district court observed, "Yet a lay person reading defendants' response to King's request would understand it to mean that § 4.07 had been adopted in 1989." (App. 40a).

The "reliance" requirement is inappropriate in this context because a participant who relied upon the Plan Administrator's response presumably would have his suspicions allayed regarding the unlawful cutback, and would have pursued his claim for benefits no further. Only a doubter, who did not take the Plan Administrator at its word, would persist in litigating his rights. Accordingly, those who

"rely" will not be litigants, and those who litigate because they disbelieve the plan administrator cannot prevail because they have not "relied."

As a result, the plan administrator who responds falsely need not fear liability, because any participant who brings suit, by definition, cannot be relying upon the false statement. In the words of the Second Circuit panel:

> Despite the alleged misleading assertion the amendment was adopted in 1989, and King's claims that the "likely effect" of the assertion was than an employee "will acquiesce in accepting less than he is entitled to receive," there was no such effect on King. He did not rely on the statement, and therefore suffered no injury and is not entitled to relief.

(App. 4a).

The "likely prejudice" rule, as formulated by the Second Circuit in *Burke* and the circuits identified in that decision, no doubt is preferable, although it errs by assessing the probable effect of the misstatement on the particular plaintiff, as opposed to weighing its materiality. As formulated by the *Burke* court, a misstatement by the plan administrator creates a presumption of likely prejudice, which the plan administrator has the burden to rebut. A plan administrator who carries this burden of proof escapes liability under the *Burke* standard *Burke*, 336 F.3d at 113.

The following hypothetical demonstrates the shortcoming of this rule. Suppose the plaintiff who sues the plan administrator, seeking reformation of an SPD containing an unlawful provision, admits to never reading the document, or for that matter any SPD issued by the plan administrator, now or in the future. Consequently, this participant is unlikely to be affected by any misstatement in the SPD, because he or she will never read it. Thus, the plan administrator should prevail on its affirmative defense, under

Burke, against this participant. Nevertheless, it is in the interest of plan participants, the plan itself, and consistent with Congress' objectives in enacting ERISA, for a court to recognize that the plan provision is unlawful and to strike it from the SPD.

This Court should resolve the split among the circuits by holding that a participant establishes a breach of fiduciary duty by proving a material misstatement of fact by a plan administrator, which was made with the intent to induce reliance. Whether that information is relied upon or likely to prejudice the recipient concerns only the appropriate remedy, not the existence of a cause of action. Under this rule, a district court would be empowered to craft equitable relief to remedy that breach, giving due consideration to the facts of each case. *See Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). If a participant actually is prejudiced by the misstatement, the court can order "make whole" relief. On the other hand, if the misstatement is likely to prejudice others, but this has not yet occurred, the court may order prophylactic measures, such as publishing a corrected SPD. In this case, perhaps the district court would enjoin the Plan Administrator from representing that § 4.07 was amended to the Plan before 1995, and require personal notice to any participant to whom it previously communicated this false information.

The Plan Administrator's breach also violates ERISA § 502(c), and this Court should so find. In response to Mr. King's written request for the 1992 Plan, the Administrator provided him the 1995 Plan, which he falsely represented became effective in 1989. Because the 1995 Plan and the 1992 Plan are distinct (the latter omits § 4.07), the Plan Administrator failed to provide the document requested by Petitioner. Thus, not only does this breach the Plan Administrator's duty to respond truthfully under ERISA § 404(a),[10] but violates as well the Plan Administrator's duty to

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10 *Varity Corp.*, 516 U.S. at 506.

provide "instruments under which the plan is operated" in response to written request. ERISA § 104(b)(4); 29 U.S.C. § 1024(b)(4). Accordingly, Mr. King should be permitted to remedy the Plan Administrator's breach by obtaining equitable relief, such as an injunction prohibiting further misstatements regarding the effective date of the challenged plan amendment, a mandatory injunction requiring the Plan Administrator to correct any previous misstatement of that fact, statutory penalties under ERISA § 502(c), and his attorney's fees as a prevailing party.

B. This Court Should Recognize That Any Participant Who Is Injured by a Plan Amendment Has Standing to Contest Its Lawfulness

Petitioner challenges the lawfulness of the amendment upon which the Plan relied to deny him pension benefits. ERISA §§ 502(a)(1) and (3). If the Court strikes this amendment, he will receive the full measure of his pension benefits. If the amendment is lawful, and remains a term of the Plan, he is entitled to no more than he is receiving. Either way, he has a direct, personal stake in this suit because it affects his monthly pension benefits.

The regulations governing the ERISA's anti-cutback and anti-backloading provisions test for these violations by considering whether the amendment violates the rights *any* participant in specified ways. Mr. King established these violations by using two Plan participant to illustrate these properties. The Second Circuit panel held that he lacked standing to assert his cutback claim because Mr. King is not a participant with respect to whom the amendment fails the regulation's tests. (App. 3a). Yet, because the Plan relies expressly on § 4.07 to deny him benefits, he is injured by that amendment. Thus, by its excessively narrow interpretation of the injury-in-fact requirement for standing, the Second Circuit has allowed an unlawful amendment to remain part of

the Plan and allowed the Plan to reduce Mr. King's pension by applying that unlawful amendment to him.

The Treasury Regulations interpreting ERISA's anti-cutback prohibition expressly state that an amendment is unlawful if it cuts back the accrued benefits of any plan participant. 26 C.F.R. § 1.411(d)-3(b) (App.81a). Mr. King demonstrated that with respect to at least one retiree § 4.07 did precisely that, which suffices to prove a violation of ERISA § 504(g). However, the Second Circuit panel determined that Mr. King lacked standing to enjoin the application of that unlawful plan provision because § 4.07 did not violate the anti-cutback rule with respect to his own pension benefits:

> King's argument on appeal—that because the "freeze" provision cut back the benefits of two non-party participants, the "freeze" provision cannot be applied to King—is unavailing. King has personally suffered no injury, and therefore lacks standing to bring this claim. See Blum v. Yaretsky, 457 U.S. 991, 999 (1982).[11]

(App. 3a).

The Seventh Circuit also has addressed the injury-in-fact requirement in the context of an ERISA claim, but reached the opposite conclusion. *Johnson v. Allsteel, Inc.*, 259 F.3d 885 (7th Cir. 2001). In that case, a plaintiff challenged the lawfulness of an amendment that enhanced the discretion afforded the plan administrator to interpret plan terms. As in this case, the plaintiff sought a declaration that the plan amendment was unlawful, reformation of the plan to remove the amended language, clarification of his rights to future benefits, and other equitable relief. *Id.* at 887. The

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[11] *Blum, supra*, of course, is a tort case and in no way speaks to whether a plan participant may sue to have an unlawful plan amendment purged, if that amendment reduces his benefits.

plaintiff did not allege that the plan administrator had exercised this discretion to deny him plan benefits, or even that a claim for benefits was pending.

Nevertheless, the Seventh Circuit reversed the district court and held that because the amendment "increased the likelihood that Johnson will, at some point, be denied benefits under the Plan," he had suffered an injury-in-fact. *Id.* at 890; *see also Allen v. Wright*, 468 U.S. 737, 751(1984) (Article III standing requires a plaintiff to allege a "personal injury-in-fact fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief"). The *Johnson* court found that the participant met the causation and redressability elements of the standing test as well, because the injury was caused by the amendment he challenged, and striking the amendment from the plan would redress that injury. *Id.* at 890.

The conflict between the Second and Seventh Circuit is even more striking with respect to the panel's reasoning as to why Mr. King lacked standing to contest the Plan's backloading provision:

> [W]e reject this claim because we conclude that King lacks standing to challenge the "repair" clause, see Blum, 457 U.S. at 999, because he had at the relevant time returned to employment for one year after his break-in-service, and therefore was decades away from being deterred from leaving employment by the incentives created by the "repair" provision. It is the impact of such deterrence that would be the basis for his standing to raise this issue.

(App. 3a-4a).

Thus, contrary to the Seventh Circuit, the Second Circuit panel considered whether the unlawful amendment *imminently* would deter Mr. King from leaving covered employment, rather than whether Mr. King suffered a cognizable injury because of the amendment's effect on his

pension.. In contrast, the Seventh Circuit found it sufficient that the participant *may* claim benefits "at some point."

Although Congress may have intended to remove backloading because it deters a participant from changing employment, a plan violates the statute if it includes a backloading provision that ERISA deems unlawful, not by deterring employees from changing their status (which may be a hoped-for by-product of the rule). Accordingly, Mr. King has been injured by a Plan provision that violates the express terms of ERISA and its regulations and therefore has standing to raise a backloading claim.

Moreover, the Second Circuit's test for standing is a *Catch-22*, because it results in the absurdity that *no* participant has standing to challenge an unlawful backloading provision. If the amendment deters a Plan participant from altering his or status, perhaps by postponing retirement, then that participant has suffered no injury for he or she will stay put, and receive a full measure of benefits. On the other hand, an employee who changes careers, or fails to repair a break-in-service for any reason, obviously has not been deterred by the Plan amendment and this participant too, according to the Second Circuit, would lack standing to challenge the amendment.

The panel's decision regarding what constitutes an injury-in-fact conflicts as well with the holdings of the Third, Ninth, and District of Columbia Circuits, in a line of cases addressing when a cause of action accrues under 29 U.S.C.§ 1112, ERISA's statute of limitations. *See Ziegler v. Connecticut Gen. Life Insurance Co.*, 916 F.2d 548, 551-52 (9th Cir. 1990) ("Westco need never have suffered an actual harm for its ERISA cause of action to have accrued"); *International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers v. Murata Erie N. Am., Inc.*, 980 F.2d 889 (3d Cir. 1992) (cause of action accrued when plan amendment enacted, not when plan terms were implemented); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 (3d Cir. 1992) (same); and *Larson v. Northrop Corp.*, 21 F.3d

1164 (D.C. Cir. 1994) (plaintiff need not suffer a financial injury before a cause of action accrues for breach of fiduciary duty). These courts hold that the limitations period begins upon enactment of an unlawful amendment, not when that amendment is applied to the plaintiff and causes a direct injury. Yet, the Second Circuit's panel opinion would deny standing to a participant who challenges at its inception the lawfulness of an amendment.

The panel's decision even conflicts with a prior panel of the Second Circuit. In *Financial Inst. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 147 (2d Cir. 1992), a panel of the Second Circuit analyzed the question of standing under ERISA by noting first that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The panel then noted that ERISA § 502(a) enumerates those persons entitled to bring suit, and § 502(a)(3) expressly identifies violations of Title I as a permissible basis for those lawsuits. Accordingly, that panel concluded that "section 1132 empowers beneficiaries to bring a civil action to redress *any* violation of the statute's fiduciary requirements." *Id.* at 148 (emphasis in original).

CONCLUSION

The Second Circuit panel's decision, although unpublished, merits review by this Court because it exemplifies the confusion and inconsistency in lower courts that have tackled the questions raised herein. The principle of full and fair disclosure of plan amendments by plan administrators is fundamental to informing participants of their rights, and to policing effectively the lawfulness of these amendments. No purpose is served by waiting to addresses these issues until another appellate court weighs in with a published decision, for no set of facts is likely to present these issues more starkly.

Respectfully submitted,

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August 2005

(any footnotes trail end of each document)

No. 03-9014
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MYRON G. KING,
Plaintiff-Appellant,

v.

PENSION TRUST FUND OF THE PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY and JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
Defendants-Appellees.

February 22, 2005, Decided

NOTICE: RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For Appellant: ALLAN G. KING (Jennifer Gillman, of counsel), Littler Mendelson, PC, Dallas, TX.

For Appellees: JANI K. RACHELSON (Bruce S. Levine, Elizabeth O'Leary, of counsel), Cohen, Weiss and Simon LLP, New York, NY.

JUDGES: PRESENT: HON. THOMAS J. MESKILL, HON. ROBERT D. SACK, HON. BARRINGTON D. PARKER, JR., Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, AFFIRMED.

Plaintiff Myron G. King appeals from the September 5, 2003, memorandum and order of the United States District Court for the Eastern District of New York (I. Leo Glasser, Judge) granting the defendants' motion for summary judgment and denying King's cross-motion for summary judgment. *King v. Pension Trust Fund, 2003 WL 22071612, 2003 U.S. Dist. LEXIS 15558* (E.D.N.Y. Sept. 5, 2003).

On appeal, King argues that the Pension Trust Fund of the Pension, Hospitalization, and Benefit Plan of the Electrical Industry ("the Plan") violates the "anti-cutback" provision in ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1), which states that "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." King also argues that the Plan is impermissibly "backloaded," violating the 133 1/3 percent rule set forth in ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B). Finally, King argues that the district court erred in ruling that King was not prejudiced by misleading documents provided by the Plan, and therefore was not entitled to relief.

We review grants of summary judgment de novo, construing the record in the light most favorable to the nonmoving party. *Church of Am. Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 203 (2d Cir. 2004).* Summary judgment is appropriate when the moving party demonstrates that there are no genuine issues of material fact and that it is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c); *Blouin ex rel. Estate of Pouliot v. Spitzer, 356 F.3d 348, 356 (2d Cir. 2004).*

King left covered employment in 1976. Because King did not return to covered employment until 1998, whether or not the "freeze" amendment was enacted by the Plan in 1989 or 1995 is of no consequence. In either case, King's pension was not "cut back" and, therefore, King is not entitled to relief. King's argument on appeal -- that because the "freeze" provision cut back the benefits of two non-party participants, the "freeze" provision cannot be applied to King -- is unavailing. King has personally suffered no injury, and therefore lacks standing to bring this claim. See *Blum v. Yaretsky, 457 U.S. 991, 999, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982).* The district court properly concluded that because King's benefits were not decreased, he is not entitled to relief.

With respect to King's argument that the Plan was impermissibly "backloaded," the district court correctly concluded that King's primary argument -- that the "freeze" provision impermissibly backloaded his pension -- was foreclosed by this Court's decision in *Langman v. Laub, 328 F.3d 68, 71-72 (2d Cir. 2003), cert. denied, 540 U.S. 1107, 157 L. Ed. 2d 893, 124 S. Ct. 1061 (2004).* While the district court noted that King's second argument -- that the "repair" clause also impermissibly backloaded the pension -- was not foreclosed by Langman, it observed that the argument had a "perverse twist" and concluded that the "repair" provision was permissible under ERISA. *King, 2003 WL 22071612, at *14-15, 2003 U.S. Dist. LEXIS 15558, at *45-46.* Without expressing a view as to the district court's conclusion in this regard, we reject this claim because we conclude that

King lacks standing to challenge the "repair" clause, see *Blum, 457 U.S. at 999*, because he had at the relevant time returned to employment for one year after his break-in-service, and therefore was decades away from being deterred from leaving employment by the incentives created by the "repair" provision. It is the impact of such deterrence that would be the basis for his standing to raise this issue.

Finally, King argues that the Joint Board's response to his request for a copy of the 1992 Plan was misleading and a breach of the Board's fiduciary duty to King, because it provided a copy of the 1995 Plan and suggested that the 1995 Plan was in effect in 1992. The district court [*5] agreed that the Board's response would have led a lay person to believe that Section 4.07 of the 1995 Plan was enacted in 1989, but concluded that the claim must fail because King had presented no evidence that he relied on the misrepresentation. Despite the alleged misleading assertion that the amendment was adopted in 1989, and King's claim that the "likely effect" of the assertion was that an employee "will acquiesce in accepting less than he is entitled to receive," there was no such effect on King. He did not rely on the statement, and therefore suffered no injury and is not entitled to relief. Thus, the district court did not err in dismissing King's claim.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

01-CV-2604 (ILG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MYRON G. KING,
Plaintiff,

v.

PENSION TRUST FUND OF THE PENSION, HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY, and THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
Defendants.

September 5, 2003, Decided

COUNSEL: For Myron G King, PLAINTIFF: Jennifer L Gillman, Littler Mendelson N, New York, NY USA.

For Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry, Joint Industry Board of the Electrical Industry, DEFENDANTS: Bruce S Levine, Jani Karen Rachelson, Cohen, Weiss and Simon LLP, New York, NY USA.

JUDGES: I. Leo Glasser, United States District Judge.

OPINION BY: I. Leo Glasser

OPINION:

MEMORANDUM AND ORDER

GLASSER, District Judge:

This case involves a dispute over the correct amount of retirement benefits owed to plaintiff Myron G. King by the defendants Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry (the "Plan") and the Joint Industry Board of the Electrical Industry (the "Joint Board"), which administers the Plan. Monthly benefits are generally computed by multiplying the number of pension credits earned (essentially the number of years of service) by the pension credit rate applicable to each credit. King worked for employers contributing to the pension plan on his behalf from 1955 to 1976 and again from 1998 to 1999 when he retired and sought a pension. Between 1977 and 1998, the Plan substantially increased the pension credit rate, but pursuant to an amendment adopted during that time period, King's pension was calculated by applying the rate in effect in 1976 (as increased by one dollar retroactively in 1989) to the first twenty-one years of service, and by applying the rate in effect for 1999 for his last year of service.

King contends that this calculation of pension benefits is wrong, and that the amendments to the pension plan that permit different rates to be applied to pension credits earned at different times violates various provisions of the *Employee Retirement Income Security Act of 1974* ("ERISA"). In essence, King seeks to have all the rate increases adopted during the 23 years he was not an employee covered by the Plan (and thus during which no contributions were made on his behalf) applied retroactively, although such application would make little sense from an actuarial standpoint. Addi-

tionally, King contends that defendants breached their statutory and fiduciary duties owed to him in the context of producing the relevant documents upon request.

Both King and defendants now move for summary judgment. Additionally, King has filed two motions to strike. The first motion seeks to strike four paragraphs in part or in whole from a declaration executed by the Joint Board's Benefits Manager, Mark Chanzis, submitted in support of defendants' motion for summary judgment as well as an exhibit attached to that declaration. The second motion seeks to strike in its entirety a second declaration executed by Chanzis submitted in support of defendants' opposition to King's motion for summary judgment.

For the reasons stated below, the motions to strike are granted in part and denied in part. King's motion for summary judgment is denied. The defendants' motion for summary judgment is granted.

BACKGROUND

Most of the facts are not in dispute.[1] The Plan is a multi-employer defined benefit pension plan established pursuant to a series of collective bargaining agreements between Local Union No. 3 of the International Brotherhood of Electrical Workers AFL-CIO ("Local 3") and employer associations or individual employers in the electrical industry. The Plan provides pension benefits to retired employees who were covered by Local 3's collective bargaining agreements while working for employers who contributed to the Plan on their behalf. The Plan is thus financed by contributions pursuant to the collective bargaining agreements from the employers and investment income generated from those contributions.

The Plan is governed by and administered in accordance with various plan documents, including the Pension, Hospitalization and Benefits Fund of the Electrical Industry Trust Agreement amended October 1, 1989 (the "Trust Agreement"); the Pension Trust Fund – Pension, Hospitalization and Benefits Plan of the Electrical Industry, as amended effective October 1, 1989 (the "Pension Plan"); and Summary Plan Descriptions which are updated about every three years.

The Joint Board is the administrator of the Plan as that term is defined by section 3(16)(A) of ERISA, *29 U.S.C. § 1002(16)(A)*. As the administrator, the Joint Board is responsible for the Plan's day-to-day administration, including maintaining records, communicating with participants, and calculating benefits in accordance with the Plan terms.

Pensions Under the Plan

Generally, a participant's monthly pension benefit is the product of the number of Pension Credits he or she has earned and the Pension Credit Rate applicable to each credit. A Pension Credit is earned for each year in covered employment, i.e., each year the participant works for an employer in a position covered by the collective bargaining agreement.

Since at least 1985, the Plan has offered at least three types of retirement pensions: Standard Pensions, Vested Pensions, and Disability Pensions. For example, pursuant to the 1985 Pension Plan document, a participant could retire on a Standard Pension if he or she (i) had attained the age of 55 in Covered Employment, (ii) had at least 20 Pension Credits, and (iii) had been employed by Contributing Employers or been available for

employment for at least twenty years prior to the date of application for the pension.[2] Under the terms of the Plan in effect in 1985, a participant who qualified for a standard pension would receive a monthly Standard Pension equivalent to $ 7.50 times the number of Pension Credits (but not to exceed $ 250 per month). By contrast, a participant can qualify for a vested pension if they leave the industry after accumulating at least ten years of service.

As of 1986 and as set forth in 1988 Plan documents, the Pension Credit Rate for Standard Pensions was increased from $ 7.50 to $ 8.50. The 1988 Pension Plan provided the same formula for determining eligibility to retire on a Standard Pension, but also provided that "The pension to which a Participant is entitled shall be determined under the terms of the Plan as in effect at the time the Participant separates from Covered Employment. A participant shall be deemed to have separated from Covered Employment on the last day of work which is followed by a one-year Break in Service." (1988 Plan, § 3.11, at 13.)

Between June 28, 1989, and August 23, 1989, the Pension Credit Rate was raised from $ 8.50 to $ 24.00 for retirements effective on or after June 8, 1989 and to $ 31.00 for retirements effective on or after June 14, 1990. However, as it increased the Pension Credit Rate, the Plan restricted the applicability of this increase to credits earned prior to 1989 if the participant had left covered employment before 1989. For example, the Summary Plan Description ("SPD") for the Plan dated June 8, 1989, explains that a vested pension will be calculated based on the applicable credit rate to the year in question:

> For participants withdrawing from the industry on or after June 8, 1989 who were to receive the "A" rate of pay as specified in the Collective Bargaining Agreement, the monthly Vested Pension benefit, payable at age 65, is calculated by multiplying the number of Pension Credits earned by the participant during the Years of Vesting Service times $ 24.00 ... A participant who withdrew from the electrical industry at any time prior to June 9, 1989 will be entitled to a monthly benefit of $ 8.50 multiplied by the number of Pension Credits, payable at age 65.
>
> ***
>
> A retired participant who returns to work in covered employment for the amount of time equal to the amount of time out of the industry, shall be entitled to have all prior years of service calculated at the unit benefit amount in effect at the time of application for pension, providing that the return to work in covered employment exceeds 2 years (3,000 straight time hours). This provision shall also apply to a participant who has withdrawn from the industry.

1989 SPD (King Dec., Ex. 9), at 8-9.

One of the main disputes between the parties is whether this same "split-rate" provision (valuing pre-break credits at the lower rate in effect upon leaving covered employment unless the participant returns to work for a number of years equal to time out of the industry) also applies to standard pensions. For example,

the section of the 1989 SPD describing standard pensions makes no mention of how to calculate pensions for an employee who leaves and then returns to covered employment. (*See id.* at 6.) Similarly, the text of the Plan amendment containing the split-rate provision adopted by the Pension Committee on June 28, 1989, stated:

> RESOLVED, that effective as of June 9, 1989 any participant who retires *on a vested pension* shall receive a pension benefit in the total amount calculated as follows:
>
> 1. for all pension credits earned prior to June 9, 1989 the rate shall be $ 8.50 per pension credit per month
>
> -Plus-
>
> 2. for all pension credits earned after June 9, 1989 the rate shall be the rate in effect at the time the participant leaves the electrical industry.

King Dec., Ex. 22 (emphasis supplied).[3]

This split-rate provision was added formally to the Pension Plan document itself in 1995. In that year,[4] the Pension Plan was revised to incorporate the following language (which is somewhat different from the 1989 amendment):

> Section 4.07. Application of Benefit Increase

Subject to the provision of the last sentence of Section 4.01 hereof, the pension amount to which a Participant is entitled shall be determined under the terms of the Plan as in effect at the time the Participant separates from Covered Employment. For purposes of this Section, a Participant shall be deemed to have separated from Covered Employment on the last day of work. The Pension Credit Rate in effect at the time of a Participant's application for a Pension shall apply to Service Credits earned before a Break-in-Service only if the period worked in Covered Employment after the Break-in-Service equals or exceeds the period of Break-in-Service. If a Participant returns to such Employment before he suffers two consecutive one year Breaks in Service, he must complete two years of Vesting Service (3,000 straight time hours) subsequent to his return to such Employment in order to be entitled to any benefit increases which may have become effective after he initially ceased such Employment. If a Participant, having suffered two consecutive one year Breaks-in-Service should subsequently return to such Employment he shall resume the accrual of Pension Credits and the portion of his pension which is attributable to such subsequent employment shall be determined under the terms of the Plan then in effect.

1995 Pension Plan, § 4.07, at 26. The 1995 Pension Plan document seems to be the most current fully stated Plan in effect.

The 1995 SPD similarly explains:

> If a participant who is eligible for a Normal, Standard or Early retirement subsequently has one or more years during which a minimum of 1,000 hours are not worked, such participant shall be entitled to one of the previously mentioned retirements upon earning a Year of Vesting Service (working at least 1,000 hours). The unit benefit amount in effect at the time of application for pension shall apply to all prior years of service only if the work in covered employment equals or exceeds the time in non-covered employment. In all cases the return to covered employment must exceed two years (3,000 hours straight time hours).

1995 SPD (King Dec., Ex. 6), at 22-23. The 1998 SPD has the same language. 1998 SPD (King Dec., Ex. 2), at 22.

After 1989, the Pension Credit Rate was raised at least four more times: in 1990 to $ 31, in 1992 to $ 35, in 1995 to $ 50, and in 1998 to $ 55.

The parties dispute whether these amendments caused a reduction in benefits and whether notice was required, but do not dispute that no notice was provided about the split-rate provision.

King's Work History

King became a member of Local 3 and a participant of the Plan in November 1955. King worked continuously in employment covered by the pension plan until November 1976 and thus earned 21 pension credits. However, in November 1976, he left covered employment, obtained a license to be an electrical contractor and formed King Electric, Inc. in January 1977. He served continuously as the president of King Electric from 1977 until 1998.

In March 1979, King Electric became a party to the collective bargaining agreement between Local 3 and the New York Electrical Contractor's Association and thus became a contributing employer to the Plan. King Electric continued to contribute to the Plan until 1998, when the company was liquidated in bankruptcy.

In August 1998, King began working as a journeyman electrician for Allcom Electric, a contributing employer to the Plan. He worked in this position for one year and earned one additional pension credit. King retired in 1999, and applied for a standard pension. This chart summarizes his relevant work history:

Length of Time	Employer	Covered Employment
Nov. 1955 to Nov. 1976 (21 years)	N/A	Yes
Jan. 1977 to Aug. 1998 (21 years, 8 months)	King Electric	No[5]
Aug. 1998 to Aug. 1999 (1 year)	Allcom Electric	Yes

After being initially informed that he would receive $ 55.00 for each year of service, King learned that his break in service after 1976 might "constitute a drastic reduction in [his] pension." Letter from Myron King to Pension Committee dated July 26, 1999 (King Dec., Ex. 13), at 1. The pension committee calculated King's pension by determining that he was entitled to 21 credits valued at the pre-1989 $ 8.50 rate and one pension credit valued at the current rate of $ 55.00. Thus, defendants awarded King a standard pension effective September 1, 1999 in an amount of $ 205.01 per month (which included an approximately 12% reduction for spousal benefits not at issue in this case).

King's Access to Plan Documents

King disputed the Plan's determination of his pension and requested an explanation. The Joint Board responded by a letter including portions of the 1998 SPD highlighting the language noted above. King appealed the determination. The Plan rejected the appeal on February 24, 2000.

On June 9, 2000, King requested that the Plan provide him with copies of the following Plan documents: all resolutions granting benefit increases under the Plan; all amendments to the Plan since 1955; every version of the Plan since 1955; the minutes of all meetings at which King's claim for pension benefits were discussed; and any and all appellate decisions by the Trustee or the Plan Administrator with respect to claims for pension benefits. King requested these documents pursuant to ERISA § 104(b)(4), *29 U.S.C. § 1024(b)(4)*

Mark Chanzis responded by stating that the documents sought were beyond the scope of *ERISA §*

104(b)(4), and that he believed all documents required by *§ 104(b)(4)* had already been provided. King then requested a copy of the Plan in effect in 1992, since that year's SPD did not describe any split-rate provision for standard pensions. Chanzis responded by providing a copy of Article IV "from the plan document" including § 4.07, and stated that the "appropriate provision was adopted by the Trustees of the Plan in 1989." (Letter from Chanzis to King dated Sept. 18, 2000, (King Dec., Ex. 20) at 1.) Chanzis also stated that he would provide a copy of the entire Plan document upon receiving a check for copying fees, and thereafter produced the 1995 Pension Plan (which as noted above, bears the legend "Amended effective October 1, 1989 except as otherwise indicated").

All administrative remedies have been exhausted. King filed suit on April 26, 2001, contending that the 1995 Pension Plan (i) impermissibly backloaded the pension, (ii) effected an unlawful cutback of accrued benefits, and (iii) significantly reduced the rate of future benefit accruals without notice. King also contends that the Plan Administrator breached its fiduciary duty to him when it failed to provide the requested Plan document in effect in 1992 and instead provided the 1995 Plan which purportedly misleads the reader about when it came into effect.

MOTIONS TO STRIKE

I. Favorable Determination by the Internal Revenue Service

King added a claim alleging that the Plan was impermissibly backloaded when he filed his Second Amended Complaint. Defendants initially opposed amendment of the complaint on the grounds that dis-

covery would be extended unduly. (O'Leary Dec. P2-3.) When King proposed adding this claim, he stated to defendants that "although the facts on which it rests seem undisputed, if you require written discovery on this issue, I am sure I can respond within ten days or less." Letter from Allan G. King to Elizabeth O'Leary dated April 29, 2002 (O'Leary Dec., Ex. A) at 1. At a status conference before Magistrate Judge Pollak, King represented that no additional discovery by plaintiff was necessary and affirmed that any discovery sought by defendants would be made available forthwith.

In their motion for summary judgment, defendants include an exhibit that is one page of the Internal Revenue Service's favorable determination that the 1995 Pension Plan document qualified as an ERISA-governed plan. (March 21, 2003 Chanzis Dec., Ex. 3.) It is undisputed that the IRS letter should have been disclosed under the automatic disclosure rules of the Federal Rules of Civil Procedure. *See Fed. R. Civ. P. 26(a)(1)(B)* ("a party must, without awaiting a discovery request, provide to other parties: ... (B) a copy of, or a description by category and location of, all documents ... that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment").

It is also undisputed that the letter was never produced. Under *Rule 37* of the Federal Rules:

> *A party that without substantial justification* fails to disclose information required by *Rule 26(a) or 26(e)(1)*, or to amend a prior response to discovery as required by *Rule 26(e)(2)*, is not, unless such failure is harmless, permitted to use as evidence at a trial,

> at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under *Rule 37(b)(2)(A), (B), and (C)* and may include informing the jury of the failure to make the disclosure.

Fed. R. Civ. P. 37(c)(1). Thus the pertinent question is whether defendants were substantially justified in failing to disclose this document. Undoubtedly, defendants were substantially justified as of the time when the Second Amended Complaint was filed, given King's representations that no more discovery was necessary.

However, to the extent that the letter is at all relevant to the backloading claim, it would also be equally relevant to the anti-cutback claim that was in the case from its inception. Accordingly, the letter should have been disclosed initially, and no substantial justification is offered for not producing it earlier. The exhibit is stricken for purposes of this motion. [6]

II. Statements by Chanzis

A. The March 21, 2003 Chanzis Declaration

1. Paragraph 8

In Paragraph 8 of his declaration dated March 21, 2003, Mark Chanzis (the Benefits Manager for the Joint Board) describes generally the process by which the

Pension Plan is restated from time to time and submitted to the Internal Revenue Service for favorable determination as required by law to ensure compliance with ERISA, and introduces the IRS letter described above as an exhibit. Although the exhibit itself should be struck, no reason is offered to strike his statements. Accordingly the motion is denied in this respect.

2. Paragraph 13

In paragraph 13 Chanzis describes what the Pension Committee considered when deciding to adopt the 1989 amendment, including their concerns "that the Plan would be actuarially harmed if this occurred because the contributions made before any such brief return to Covered Employment would not sustain retroactive application of the increased rate." Chanzis also introduces the minutes of two meetings describing some of these considerations, but not others. The minutes reveal that Chanzis was not present at the meetings.

King objects to Chanzis's statements here on the grounds that he lacks personal knowledge to describe what a committee considered at its meeting when he himself was not present. Defendants contend that Chanzis is merely stating what appears in the minutes and that in any event, as the Benefits Manager in 1989 he would have personal knowledge about the reasons why the 1989 amendment was adopted.

To the extent that Chanzis seeks to authenticate and introduce the minutes of the meetings, his declaration is admissible. *See Owens-Corning Fiberglas Corp. v. U.S. Air, 853 F. Supp. 656, 663 (E.D.N.Y. 1994).* However, to the extent that Chanzis's declaration makes statements that go beyond the minutes, his declaration does not establish how he has personal knowl-

edge of what was discussed and considered by persons in attendance at those meetings. Thus, to the extent his statements go outside the scope of the minutes, they are stricken.

3. Paragraphs 14 and 36

In paragraph 14, Chanzis states that the 1989 amendment "is memorialized in the Pension Plan and the various Summary Plan Descriptions," and provides as examples § 4.07 from the 1995 Pension Plan, the language in the 1989 SPD regarding vested pensions, and the 1998 SPD language described above.

In paragraph 36, Chanzis states in part "The Joint Board's disclosure obligations under ERISA require that the Joint Board send participants copies of current plan document [sic] upon request ... I believe that the Joint Board more than complied with its disclosure obligation under ERISA."

King contends that these two paragraphs are inadmissible legal conclusions. However, defendants are correct to the extent that these statements are tendered in an effort to demonstrate the Joint Board's interpretation of the 1989 amendment, they are relevant because a court reviews such interpretations only to determine if they are arbitrary or capricious. Therefore, the statements in paragraph 14 are not stricken. As for the statements in paragraph 36 which only state legal conclusions as to a party's compliance with its statutory requirements, King is correct that these are legal conclusions. Therefore, those statements are stricken.

B. The April 9, 2003 Declaration

King seeks to strike most of this declaration. In that declaration, Chanzis states that the split-rate provision has been applied uniformly to all pensions (P3), including standard pensions since 1989, explains that changes to the SPD (such as the change between the 1992 and 1995 SPDs regarding the split-rate provision) are simply efforts to better describe the terms of the Plan (P4), that the 1989 amendment was not restricted only to vested pensions (P5), and that King was never entitled to benefits above the $ 8.50 rate since he never returned to Covered Employment until 1998 (P6).

King first seeks to strike paragraph 3 on the basis that it is essentially conclusory testimony about facts which defendants previously stated was irrelevant -- the number of participants whose benefits were calculated either using pension credit rates less than the one in effect on the date of retirement or where a break in service had occurred. During discovery, defendants objected to this request on the grounds that it was not relevant, but produced responsive documents for certain months to provide a small random sample. Dissatisfied, King obtained an order from Magistrate Judge Pollak requiring production of these records for 1998 and 1999.

King then argues that Chanzis goes well beyond the scope of the discovery provided to assert that the split-rate provision has been applied consistently since 1989, and argues that his testimony is essentially summary testimony precluded by *Fed. R. Evid 1006*. Defendants are correct that to the extent Chanzis can state with personal knowledge these facts they are admissible. *Rule 1006* which only governs charts, summaries or calculations, is inapplicable by its terms.

As to paragraphs 4 through 6, however, King is correct that they are little more than legal argument over facts already introduced by prior affidavits and exhibits. Although the inclusion of legal argument in an affidavit or declaration would not in and of itself justify striking the declaration, such legal arguments are ignored since they presumably are present (or should be) in the memoranda of law filed by defendants.

SUMMARY JUDGMENT MOTIONS

Summary judgment "shall be rendered forthwith if the pleadings, depositions ... together with the affidavits ... show that there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c).* A "moving party is entitled to judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1985)* (internal quotation marks and citations omitted). In deciding a summary judgment motion, a court should not resolve disputed issues of fact; rather, it simply must decide whether there is any genuine issue to be tried. *Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir. 1988).* A disputed fact is material only if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a reasonable jury could return a verdict in her favor. *Id., at 248-49.* The motion "will not be defeated merely ... on the basis of conjecture or surmise." *Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991).* "In as-

sessing the record to determine whether there is a genuine issue of fact, the court is required to draw all inferences in favor of the party against whom summary judgment is sought." *Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989).*

Cross-motions for summary judgment is the same as that for an individual motion for summary judgment. *See Morales v. Quintel Entertainment, Inc., 249 F.3d 115, 121 (2d Cir. 2001).* Each motion is considered independently of the other; when evaluating each, the court considers facts in the light most favorable to the non-moving party. *See id.*

I. The Determination of King's Pension

A. Deference Owed to the Trustees' Decision

The presently-existing Plan gives the Pension Committee discretion to interpret the terms of and apply the Pension Plan. (Trust Agreement (Mar. 21, 2003 Chanzis Dec., Ex. 1), § 5.17; 1995 Pension Plan (King Dec., Ex. 5), § 5.19; 1998 SPD (King Dec., Ex. 2), at 24.) Where an ERISA-governed plan grants its administrator or fiduciary discretion to determine eligibility for benefits or to construe terms of a plan, a denial of benefits is reviewed only to determine if it was arbitrary or capricious. *See Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989).* A decision by an administrator who has been granted such discretion can thus be overturned "only if the decision was without reason, unsupported by substantial evidence or erroneous as a matter of law." *Celardo v. GNY Automobile Dealers Health & Welfare Trust, 318 F.3d 142, 146 (2d Cir. 2003)* (internal quotations omitted).

B. ERISA's Anti-Cutback Rule

Pursuant to ERISA § 204(g)(1), *29 U.S.C. § 1054(g)(1)*, the accrued benefits of a participant under a plan, with certain exceptions not relevant here, may not be decreased by plan amendment. An accrued benefit is defined statutorily as an "individual's accrued benefit determined under the plan and ... expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A); *29 U.S.C. § 1002(23)(A)*.

It is undisputed that before June 1989, King's accrued benefit was equal to 21 credits times $ 8.50, or $ 178.50. What is disputed is when the amendment to the Plan took effect. Defendants contend that the split-rate provision was adopted *for all pensions* during the summer of 1989, and that King's accrued benefit remained $ 8.50 times 21 credits ($ 178.50 per month) after the amendment, and therefore his accrued benefits were never reduced. King, on the other hand, contends that the split-rate provision was not adopted with regard to *standard pensions* until 1995. By 1995, under King's analysis the accrued benefit amounted to $ 35.00 times 21 credits, or $ 735.00 per month. However, the application of the split-rate provision that year then reduced the accrued benefit from $ 735.00 to $ 178.50, King contends, and thus violates the anti-cutback rule.

Defendants compare this case to *Langman v. Laub, 2002 U.S. Dist. LEXIS 5106, No. 97 Civ. 6063 (MGC), 2002 WL 472033 (S.D.N.Y. Mar. 28, 2002), aff'd, 328 F.3d 68 (2d Cir. 2003)*, and similar cases. (See Def. S.J. Mem. at 17-20.) In that case, a union pension fund adopted a similar split-rate provision in 1984 that, in situations where a participant left and then returned to covered employment, fixed the credit rate to the rate in

effect at the time of separation for those credits earned prior to separation, but valued credits earned subsequent to returning to employment at the credit rate in effect at the time of retirement. *2002 U.S. Dist. LEXIS 5106, at *2-3.* The court granted summary judgment to the plan, holding that nothing had been reduced post-amendment of the plan. *2002 U.S. Dist. LEXIS, at *3.* The court rejected the notion that a participant could rely upon their reasonable expectations that he or she could return to covered employment after a break in service and find that the plan had decided to increase the benefit rate retroactively. *Id.* The Second Circuit recently affirmed this decision in favor of the plan. *328 F.3d 68 (2d Cir. 2003).* However, unlike the dispute here, the plan in *Langman* did not involve a dispute as to when the operative amendment took effect. In other words, the operative question posed here is whether the split-rate provision took effect with regard to standard pensions in 1989 or 1995.

King compares this case to *Ryan v. Asbestos Workers Union Local 42 Pension Fund*, No. Civ. A 97-604-GMS, *2000 WL 1800530* (D. Del. Apr. 4, 2000), *aff'd in part, vacated and remanded on other grounds, 27 Fed. Appx. 100 (3d Cir. 2002)* (non-precedential decision). In *Ryan*, the plaintiff had worked in covered employment for fourteen years until 1969, and then experienced a break in service until sometime in 1983 when he returned to work until 1996. *Id.* at *2. However, in 1983, the pension plan adopted an amendment (retroactive to 1981) that created a two-tier scheme similar to the one adopted in the present case except that it permitted any participant whose break in service was less than ten years to receive a pension calculated solely at the current rate if he or she worked at least two years after

returning to covered employment. *Id.; see 27 Fed. Appx. at 102.* The district court held that the amendment was impermissibly retroactive as applied to the plaintiff since it was adopted only after plaintiff had already incurred a break in service longer than ten years, thus freezing the benefits received. *Id.* at *4-5.[7]

The district court in *Ryan* focused on the retroactive impact of the amendment, a feature not present in this case. To the extent that *Ryan* can be read to hold that any plan amendment which operates to "freeze" the value of certain already accrued benefits violates the anti-cutback rule, that contention was rejected squarely by *Langman.* As Judge Cedarbaum stated, the proper inquiry under *ERISA § 204(g)(1)* is whether "plaintiff's monthly benefit was in fact reduced" by a plan amendment. *2002 U.S. Dist. LEXIS 5106, 2002 WL 472033, at* *2. In other words, the court should determine first what accrued benefits King had when the split-rate provision took effect.

In their reply papers, defendants contend they have consistently applied the split-rate provision in cases like King's and granted a standard pension based on the split rate provision, and rely on the worksheets of 24 participants. (Def. Reply Mem. at 6-7.) However, of these twenty four participants, only three involve standard pension participants whose monthly benefits were calculated using two or more rates: Case Nos. 16-ST-08-98, 10-ST-06-00, and 13-ST-02-98.[8] Additionally, the split-rate provisions appears to have been applied in the same manner to three early retirement pensions and one disability pension. Defendants argue that since they have applied the split-rate provision consistently to calculate pensions, their interpretation of the 1989 amendment is not arbitrary.[9]

However, to accept defendants' argument would be to ignore the plain text of the 1989 amendment, which clearly stated: "As of June 9, 1989 any participant who retires *on a vested pension* shall receive a pension benefit in the total amount calculated as follows ... " Any participant entitled to a standard pension who looked at this amendment to the plan, or at the 1989 SPD that incorporated its terms solely in the description of Vested Pensions, would have no basis to believe that it would apply to any other pension benefit. Although the minutes of the Pension Committee meeting that adopted the 1989 amendment discusses the risk that an "inactive vested participant" might return to work, it is wholly unclear why participants at the pension committee meeting would have reason to believe that the split-rate provision would apply to all pensions given the clear text of the amendment. Moreover, the consistent application claimed by defendants has little weight given that only seven instances are described and, more importantly, all seven pension calculations were made after 1995 and the adoption of § 4.07.

"Where the trustees of a plan ... interpret the plan in a manner inconsistent with its plain words, ... their actions may well be found to be arbitrary and capricious." *Miles v. New York State Teamsters Conf. Pension & Ret. Fund Employee Pension Benefit Plan, 698 F.2d 593, 599 (2d Cir. 1983).* Thus, since the plain language of the 1989 amendment only applied to vested pensions, the 1995 Pension Plan document (which applies the split-rate provision to *all* pension categories including standard pensions) provides the operative time to examine the applicable rate to King's accrued benefits.

In 1995, King had already earned 21 pension credits. King would have those benefits simply calculated as fol-

lows: 21 pension credits times $ 50.00 (the 1995 value), or $ 1,050. However, this calculation ignores a crucial provision in the Pension Plan.

Section 3.11 of the 1988 Pension Plan provides that "The pension to which a Participant is entitled shall be determined under the terms of the Plan as in effect at the time the Participant separates from Covered Employment." The 1995 Pension Plan provided similarly: "For employees, who separated from Covered Employment before June 8, 1995, the monthly amount of the Normal Retirement Pension is the amount specified in accordance with the Plan in effect as of the date of such Pensioner's separation from Covered Employment." (1995 Plan, § 4.01(a).) In 1995, when the split-rate provision became applicable to standard pensions, King had not returned to Covered Employment, and thus his pension would be determined under the terms of the Plan in effect when he separated from Covered Employment. The value of King's accrued benefit in 1995 was only $ 8.50 per pension credit (the value when he left Covered Employment in 1976 as retroactively increase as of 1986). The 1995 Pension Plan did not reduce his benefits by any measure, and thus the application of the split-rate provision to standard pensions that year did not violate *ERISA § 204(g)(1).*

Accordingly, summary judgment is granted to defendants on the anti-cutback claim.

C. The Notice Requirement under *ERISA § 204(h)(1)*

At all times relevant herein, *ERISA § 204(h)(1)* provided:

> A [defined benefit] plan ... may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to [plan participants and certain other parties.]

29 U.S.C. § 1054(h)(1) (West 1999).[10] IRS regulations interpreting this statute state that "an amendment to a defined benefit plan affects the rate of future benefit accrual only if it is reasonably expected to change the amount of the future annual benefit commencing at normal retirement age." 26 C.F.R. § 1.411(d)-6. There are few cases interpreting the statute. *See, e.g., Davidson v. Canteen Corp., 957 F.2d 1404, 1407 (7th Cir. 1992)* (amendment excluding stock options from definition of compensation used to calculate retirement benefits held to significantly reduce future benefit accruals); *Copeland v. Geddes Fed. Sav. & Loan Ass'n Ret. Income Plan, 62 F. Supp. 2d 673, 679 (N.D.N.Y. 1999)* (amendment eliminating use of certain tables by which to calculate adjustments to benefits held to significantly reduce future benefit accruals).

King contends that but for the split-rate provision, his pension credits would have all been valued at $ 55, but the provision reduced the rate at which his future benefits accrued. King misunderstands the split-rate provision. The split-rate provision at issue here sought to leave the value of the benefits accrued by partici-

pants who had left covered employment untouched unless they returned to work for a time equal to the amount of the break in service, but to permit future benefits accrued to be valued at a higher rates. After the split rate provision was adopted, King's *future* benefits (if any were accrued) would continue to accrue at a rate either equal to or higher than they did beforehand. The mere fact that his accrued credits already accrued would not similarly increase in value is not a reduction in the rate of future benefit accrual. This is therefore unlike the cases cited above, because the rate of future benefit accruals has increased following the adoption of the split rate provision.

D. Does the Split-Rate Provision Impermissibly Backload Benefits?

By enacting ERISA, Congress "established minimum accrual rates to prevent the employer from backloading benefits-making benefits accrue very slowly until employee is near retirement age." *Carollo v. Cement & Concrete Workers Dist. Council Pension Plan, 964 F. Supp. 677, 681 (E.D.N.Y. 1997).* In other words, an employer cannot provide "inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and [] concentrate[e] the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement." H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4688.

A plan must meet one of the three statutory tests to determine whether it satisfies this minimum accrual requirement. The only test at issue in this case is the 133133 1/3 % test, which provides that:

A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph–

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

ERISA § 204(b)(1)(B); *29 U.S.C. § 1054(b)(1)(B)*. Pursuant to the IRS regulations regarding this provision:

> 133 1/3 percent rule--(i) General rule. A defined benefit plan satisfies the requirements of this subparagraph for a particular plan year if--
>
> (A) Under the plan the accrued benefit payable at the normal retirement age (determined under the plan) is equal to the normal retirement benefit (determined under the plan), and
>
> (B) The annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year cannot be more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

26 C.F.R. § 1.411(b)-1(b)(2). Additionally, "any amendment to the plan which is in effect for the current plan year shall be treated as if it were in effect for all other plan years." 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(A).

King contends that by adopting the split-rate provision, defendants have impermissibly backloaded the plan. King's arguments are two-fold. First, King argues that he accrued benefits at the rate of $ 55 per year of service in his last year of employment (1998-1999), that he accrued benefits for all other years of service at the

rate of $ 8.50 (1955-1976), and that since $ 55 is far in excess of 133 1/3 % of $ 8.50, the split-rate provision violates ERISA's requirements. (See Pl. Mem. Supp. S.J. at 8.) However, this same argument was recently rejected by the Second Circuit's decision (reached only after briefing on this motion was complete) in *Langman v. Laub, 328 F.3d 68 (2d Cir. 2003)*. There the plan in question was amended to prorate benefits for participants who had separated from employment for more than one year so that service prior to separation was credited with the benefit rate in effect at the time of separation. The plaintiff in *Langman* claimed this two tier structure violated the 133 1/3 % rule. The Second Circuit rejected this argument:

> This argument, however, completely misapprehends the acknowledged purpose of the 133 1/3 percent test, which is to prevent the practice known as backloading of benefits ... In other words, the test applies to how a given plan operates at a given time and prevents it from being unfairly weighted against shorter-term employees; but it is irrelevant to across-the-board increases in benefit rates made at some future time on behalf of all current employees regardless of period of service. Indeed, it would be a strange rule that would prohibit a fund from making more than a one-third increase in its across-the-board benefit rate unless that rule were retroactively applied to all former employees; yet this would be the effect of plaintiff's interpretation. Accordingly, we concluded that defendants did not violate the 133 1/3 percent test by pro rating his

> monthly benefit in accordance with the Plan's separation provision.

Id. at 71-72. This ruling renders King's argument meritless.

However, King also advances a second, more nuanced argument. King contends that it is not simply the split-rate provision which violates the 133 1/3 % rule, but rather the repair clause within the split-rate provision that is the problem. In relevant part, § 4.07 of the 1995 Pension Plan states: "The Pension Credit Rate in effect at the time of a Participant's application for a Pension shall apply to Service Credits earned before a Break-in-Service only if the period worked in Covered Employment after the Break-in-Service equals or exceeds the period of Break-in-Service." As applied to King, this would mean that if he had worked for 21 years after returning to work in 1998, his pension credits earned during his first tenure in covered employment would increase in value by over 600% from $ 8.50 to $ 55.00 (or whatever the pension credit rate would be in effect for 2019).

Indeed, in his letter brief submitted after the *Langman* decision, King focuses closely on the Second Circuit's observation that "*across-the-board increases* in benefit rates made at some future time on behalf of all current employees *regardless of period of service*" are irrelevant for purposes of the 133 1/3 % rule. *See 328 F.3d at 71.* King notes that the split-rate provision instead provides an increase in benefits only for certain participants, namely those employees who return to service for a determinable length of time, and therefore "excludes 'across-the-board' increases in benefit rates from applying to the pre-break service of current em-

ployees with 'unrepaired' breaks ... As a consequence, the Plan imposes a substantial penalty on participants who leave before the overtaking year and concentrates the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement." (Pl. Letter Br. dated June 3, 2003, at 2.)

Defendants argue that this misreads the statutory language, which states that "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." ERISA § 204(b)(1)(B)(i); *29 U.S.C. § 1054(b)(1)(B)(i)*. In other words, the test applies the amendment in question as if it had been in effect all along. However, this reading does not help Defendants' case, since even if the split-rate provision had been in effect since King first started employment, it would create the problem of the spike in benefits after a certain length of service for employees who return to work after a break in service.

In a letter brief filed after the Second Circuit's *Langman* decision, defendants argue that its reasoning avails them and not King. Defendants claim that as in *Langman* "there is no correlation between the ability to avoid a split-rate calculation and whether a participant is a longer-term or shorter-term employee," Def. Letter Br. dated May 19, 2003, at 3. Defendants also note that the Second Circuit warned against "strange rule[s]" that inhibit the ability of a plan to increase benefit rates prospectively. *See Langman, 328 F.3d at 71*. King's argument indeed has a perverse twist - a pension plan can increase benefit rates both prospectively and retroactively for current employees, but cannot permit former employees who return to work in covered employment to make up their lost time of service to take advantage

of the retroactive application of the benefits afforded to those employees fortunate enough to have remained in employment. Under King's interpretation of the 133 1/3 % rule, a pension plan could never employ any method like the "repair" method by which a participant who by happenstance is not covered when plan benefits increase to take advantage of the increase like his or her co-workers.

Moreover, it should be noted that interpreting the 133 1/3 % rule to permit a pension plan to adopt "repair" provisions does not run afoul of the rule's purpose which focused on preventing employers from restricting employees' workplace mobility. As the House Report regarding ERISA stated:

> The primary purpose of [minimum accrual rates] is to prevent attempts to defeat the objectives of the minimum vesting provisions by providing undue "backloading," i.e., by providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and by concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement.

H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4688. "Repair" or "cure" provisions like that adopted by defendants here do not concentrate the accrual of benefits on any fixed tenure of employment or on a benchmark linked to the approach of retirement, but rather focus on a wholly different feature:

the length of the ill-timed (in hindsight) break in service.

Accordingly, the split-rate provision including its "repair" provision does not violate the 133 1/3 % rule. Defendants are entitled to summary judgment on the backloading claim.

II. Production of Plan Documents to King

King's final claim is that defendants breached their fiduciary duty by failing to provide documents as required pursuant to *ERISA § 104(b)(4)*. That section provides:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete reports ...

ERISA § 104(b)(4); *29 U.S.C. § 1024(b)(4)*. Although defendants provided King with a copy of the 1995 Pension Plan and the 1998 SPD, and told him that § 4.07 of the 1995 Pension Plan was adopted in 1989, King contends that these responses violate ERISA for two reasons. First, King argues that other plan documents detail the prior levels of the pension credit rate in effect since 1989 (including the $ 8.50 rate applied to his first 21 years of service), and since those pension levels are necessary to calculate pension benefits, they are "other

instruments under which the plan is established or operated." Second, King contends that the Joint Board's responses were misleading.

The Second Circuit has interpreted the "other instruments" clause to mean the "formal legal documents that govern or confine a plan's operations, rather than the routine documents with which or by means of which a plan conducts its operations." *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 139, 146 (2d Cir. 1997).* The 1995 Pension Plan (along with the summary plan description) is the legal document that governed the plan's calculation of his benefits. The only other documents that would be required to determine King's pension would be documents necessary to calculate the appropriate rate for his pre-break service. Accordingly, this would require referring to the 1988 Pension Plan and the 1989 SPD, which state that any service accrued prior to 1989 would be valued at $ 8.50.

In their reply papers, defendants admit that these documents were not provided but argue essentially that the only requests made that encompassed that information was in an overbroad request that sought documents far outside the bounds of *ERISA § 104(b)(4).*[11] King then narrowed his request to focus on discrepancies between the 1992 and 1998 SPDs, and requested a copy of "the 1992 Plan, or any provisions that contain the language omitted from the SPD, if the provision is included in the Plan. Additionally, if that provision was added to the Plan by amendment, Mr. King wishes to review that amendment as well." Letter from Allan G. King to Mark Chanzis, dated Aug. 14, 2000 (King Dec., Ex. 27) at 1.[12]

Defendants are correct that although *§ 104(b)(4)* may entitle King to operative documents, the 1992 documents are not such documents. Apart from the need to reference past plans for one specific purpose - the determination of the pension credit rate in effect when a participant took a break in service - the current Plan documents are the relevant operative documents and King has not shown why a discrepancy in an SPD issued before the Pension Plan was restated in 1995 would be an operative document. Nor should defendants be penalized simply because a small subset of the large universe of documents initially requested might fall under *ERISA § 104(b)(4)*.

King also contends that in responding to his requests for information, defendants misled him in their responses. ERISA fiduciaries have a "fiduciary duty to provide [participants] with complete and accurate information about her retirement options." *Becker v. Eastman Kodak Co., 120 F.3d 5, 9 (2d Cir. 1997)*; *see Switzer v. Wal-Mart Stores, Inc., 52 F.3d 1294, 1299 (5th Cir. 1995)* (upon receiving an inquiry from a beneficiary, a plan administrator "has a fiduciary obligation to respond promptly and adequately in a way that is not misleading"); *Electro-Mechanical Corp. v. Ogan, 9 F.3d 445, 451 (6th Cir. 1993)* ("ERISA imposes a duty upon fiduciaries to respond promptly and adequately to employee-initiated inquiries regarding the plan or any of its terms."). King specifically requested an explanation as to why the language in the 1998 SPD was not in earlier versions of the document and was told that the operative plan language in § 4.07 of the 1995 Pension Plan had been adopted in 1989. This statement was misleading. The 1989 Amendment clearly encompassed only vested pensions and a comparison of the language used

in the 1989 Amendment and that used in § 4.07 reveals they are drafted quite differently. Yet a lay person reading defendants' response to King's request would understand it to mean that § 4.07 had been adopted in 1989. As King notes, had the Joint Board provided the 1989 amendment and the 1988 Pension Plan document, he would have realized earlier that defendants were applying a provision governing vested pensions to his standard pension.

However, this is not the end of the analysis. King seeks statutory penalties under ERISA § 502(c)(1), *29 U.S.C. § 1132(c)(1)*, for these actions. *Section 502(c)(1)* states in relevant part:

> Any administrator ... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary ... within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Yet defendants' breach was not failing to comply with a proper request for information, but misleading King about the dates when § 4.07 was adopted. Thus, no statutory violation occurred.

King claims that the misrepresentation also constituted a breach of fiduciary duty. "To establish a claim for breach of fiduciary duty based on alleged misrepresentations about the terms of the Plan, plaintiff must

show: (1) that defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that these constituted material misrepresentations; and (3) that plaintiff relied on those misrepresentation to his detriment." *Dobson v. Hartford Fin. Servs., 196 F. Supp. 2d 152, 163 (D. Conn. 2002)* (citing *Varity Corp. v. Howe, 516 U.S. 489, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996)* and *Ballone v. Eastman Kodak Co., 109 F.3d 117, 126 (2d Cir. 1997)*). King has presented no evidence of reliance.

Accordingly, King's motion for summary judgment for breach of fiduciary duty in this regard is denied.

CONCLUSION

For the reasons stated above, plaintiff's first motion to strike is granted in part as to the exhibit 8 and paragraphs 13 (to the extent they go beyond a description of the minutes of two meetings) and 36 of the Declaration of Mark Chanzis dated March 21, 2003, and otherwise denied. Plaintiff's second motion to strike is denied, although any legal argument contained therein is improper and not considered. Defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

Date: September 5, 2003

I. Leo Glasser

United States District Judge

Footnotes

n1 This factual summary is based upon the undisputed portions of both parties' statements submitted pursuant to Local *Rule 56.1*. Where material facts are disputed, this background so notes.

n2 Under the most recent Pension Plan document, a Standard Pension requires the same three criteria except that participant must attain the age of 60 in Covered Employment. 1995 Pension Plan, § 3.03 (King Dec., Ex. 5).

n3 The minutes of the June 28, 1989 Pension Committee meeting where this amendment was adopted state:

> A situation may occur where an inactive vested participant returns to work in the industry and again the Trustees have options.
>
> a) The Trustees may impose a waiting period of X years whereby a returned participant who works that required number of years will earn all of his benefits at the rate in effect at the time he retires.
>
> b) The Trustees may credit all prior years at the $ 8.50 rate and credit future years at the benefit rate in effect at the time he returns.

Minutes of the Pension Committee of the Joint Board Meeting Held June 28, 1989, at 2 (Chanzis Dec., Ex. 7);

see also Minutes of the Special Pension Meeting of the Joint Board Held Aug. 31, 1989, at 2 (Chanzis Dec., Ex. 8) (summarizing pension committee meeting). The text of the Amendment is notably limited to those participants who retire on a vested pension.

n4 Although the 1995 Pension Plan bears on its face the legend "Amended effective October 1, 1989 except as otherwise indicated," the witness offered by defendants pursuant to *Rule 30(b)(6)* stated at his deposition that the Pension Plan bearing that legend was authored in fact "around 1995." (Chanzis Dep. (King Dec., Ex. 31) at 9:25-10:1.)

n5 As noted above, during this time King Electric made no contributions at all from 1977 to 1979, and even after it became a party to the CBA with Local 3, it did not make contributions on King's behalf from 1979 to 1998.

n6 In any event, as the parties recognize, the relevance of this letter is modest at best. A "Plan's reliance on [IRS] determination letters cannot shield it from liability in a suit brought by a plan participant for violations of ERISA." *Esden v. Bank of Boston, 229 F.3d 154, 176 (2d Cir. 2000); Carollo v. Cement & Concrete Workers Dist. Council Pension Plan, 964 F. Supp. 677, 685 (E.D.N.Y. 1997)* ("Plan participants have no opportunity to be heard in an application for a favorable determination letter from the Service, and a determination by the Service, while entitled to deference, is not binding on the court."). Thus, even if the letter were considered, it would not change the reasoning herein.

n7 On appeal, the parties agreed that the plan amendment "reduced Ryan's benefits," and instead focused on whether the pension in question was an "annual benefit

commencing at normal retirement age" for purposes of *ERISA § 204(g)(1). 27 Fed. Appx. at 104.* Although the plan argued that the plaintiff's benefits were actually early retirement benefits (because the plaintiff retired before age 65) not subject to ERISA's anti-cutback rule, in its non-precedential opinion the Third Circuit rejected this contention because the plaintiff in fact received a full retirement pension and it was not actuarially reduced.

n8 The other cases provided by defendants either involved benefits that were calculated only at the latest rate prior to retirement (usually because their number of years of service after a break in service exceeded the length of the break) or else were awarded early retirement pensions (3 cases), disability pensions (1 case), or a vested pension (3 cases). At least one case (16-ST-08-98) appears to be listed twice.

n9 King misinterprets the terms of the 1989 SPD in one of his briefs. King argues that the 1989 SPD permits participants to cure their breaks in service merely after two years of service. (Pl. Mem. Opp. S.J. at 7-9.) Yet the 1989 SPD Plan clearly states: "A retired participant who returns to work in covered employment *for the amount of time equal to the amount of time out of the industry*, shall be entitled to have all prior years of service calculated at the unit benefit amount in effect at the time of application for pension, providing that the return to work in covered employment exceeds 2 years ...." Thus the two year requirement is an additional proviso to the cure and not the only requirement.

n10 In 2001, this section was substantially revised, but no party contends that the revisions have any relevance to this case.

n11 *See, e.g., Medoy v. Warnaco Employees' Long Term Disability Ins. Plan, 43 F. Supp. 2d 303, 310 (E.D.N.Y. 1999)* ("individual claims determination records ... are not covered by *§ 1024(b)(4)*").

n12 Defendants responded by providing a copy of § 4.07 of the 1995 Pension Plan and the cover page with its legend stating "amended effective October 1, 1989 except as otherwise indicated," and stating that a complete copy of the Pension Plan document would be sent upon payment of copying fees.

No. 03-9014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MYRON G. KING,
Plaintiff-Appellant,

v.

PENSION TRUST FUND OF THE PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY and JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
Defendants-Appellees.

Filed 6/1/2005

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Myron G. King. Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the jduges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Roseann B. MacKechnie, Clerk

29 USC § 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and—

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) Enumeration of plan requirements

(1)

(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 331/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for

which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 1331/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued bene-

fit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to Sep-

tember 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052 (a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081 (b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081 (b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits un-

der the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H)

(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan

with respect to such employee has not commenced as of the end of such year in accordance with section 1056 (a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053 (a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414 (q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secre-

tary of the Treasury pursuant to clause (v) of section 411 (b)(1)(H) of title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411 (b)(1)(H).

(2)

(A) A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

(B) A plan shall not be treated as failing to meet the requirements of subparagraph (A) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(C) Any regulations prescribed by the Secretary of the Treasury pursuant to subparagraphs (B) and (C) of section 411 (b)(2) of title 26 shall apply with respect to the requirements of this paragraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411 (b)(2).

(3) A plan satisfies the requirements of this paragraph if—

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(4)

(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052 (b) of this title, determined without regard to section 1052 (b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as de-

termined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)

(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is—

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) Defined benefit plans.— In the case of a

defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 1055 (g)(3) of this title (as of the determination date).

(C) For purposes of this subsection, the term "accumulated contributions" means the total of—

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053 (a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually—

(I) at the rate of 120 percent of the Federal mid-term rate (as in effect under section 1274 of title 26 for the 1st month of a plan year for the period beginning with the 1st plan year to which subsection (a)(2) of this section applies by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 1055 (g)(3) of this title (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts con-

tributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plans, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disre-

garded in determining employee's accrued benefits under plan

Notwithstanding section 1053 (b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received—

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than the dollar limit under section 1053 (e)(1) of this title) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) of this section unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) of this section with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection

(c)(2)(C) of this section and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who—

(1) received such a distribution in any plan year to which this section applies which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section.

The plan provision required under this subsection may provide that such repayment must be made

(A) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or

(B) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(f) Employer treated as maintaining a plan

For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082 (c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409 (a) of title 26, or

(B) employee stock ownership plan (as defined in section 4975 (e)(7) of title 26),

shall not be treated as failing to meet the re-

quirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(4)

(A) A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that—

(i) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan;

(ii) the terms of both the transferor plan and the transferee plan authorize the transfer described in clause (i);

(iii) the transfer described in clause (i) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan;

(iv) the election described in clause (iii) was made after the participant or beneficiary received a notice describing the consequences of making the election; and

(v) the transferee plan allows the participant or beneficiary described in clause (iii) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the

form of a single sum distribution.

(B) Subparagraph (A) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(5) Except to the extent provided in regulations promulgated by the Secretary of the Treasury, a defined contribution plan shall not be treated as failing to meet the requirements of this subsection merely because of the elimination of a form of distribution previously available thereunder. This paragraph shall not apply to the elimination of a form of distribution with respect to any participant unless—

(A) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated; and

(B) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

(h) Notice of significant reduction in benefit accruals

(1) An applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides the notice described in paragraph (2) to each applicable individual (and to each employee organization representing applicable individuals).

(2) The notice required by paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the

Secretary of the Treasury) to allow applicable individuals to understand the effect of the plan amendment. The Secretary of the Treasury may provide a simplified form of notice for, or exempt from any notice requirement, a plan—

(A) which has fewer than 100 participants who have accrued a benefit under the plan, or

(B) which offers participants the option to choose between the new benefit formula and the old benefit formula.

(3) Except as provided in regulations prescribed by the Secretary of the Treasury, the notice required by paragraph (1) shall be provided within a reasonable time before the effective date of the plan amendment.

(4) Any notice under paragraph (1) may be provided to a person designated, in writing, by the person to which it would otherwise be provided.

(5) A plan shall not be treated as failing to meet the requirements of paragraph (1) merely because notice is provided before the adoption of the plan amendment if no material modification of the amendment occurs before the amendment is adopted.

(6)

(A) In the case of any egregious failure to meet any requirement of this subsection with respect to any plan amendment, the provisions of the applicable pension plan shall be applied as if such plan amendment entitled all applicable individuals to the greater of—

(i) the benefits to which they would have been entitled without regard to such amendment, or

(ii) the benefits under the plan with regard to

such amendment.

(B) For purposes of subparagraph (A), there is an egregious failure to meet the requirements of this subsection if such failure is within the control of the plan sponsor and is—

(i) an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection),

(ii) a failure to provide most of the individuals with most of the information they are entitled to receive under this subsection, or

(iii) a failure which is determined to be egregious under regulations prescribed by the Secretary of the Treasury.

(7) The Secretary of the Treasury may by regulations allow any notice under this subsection to be provided by using new technologies.

(8) For purposes of this subsection—

(A) The term "applicable individual" means, with respect to any plan amendment—

(i) each participant in the plan; and

(ii) any beneficiary who is an alternate payee (within the meaning of section 1056 (d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056 (d)(3)(B)(i) of this title),

whose rate of future benefit accrual under the plan may reasonably be expected to be significantly reduced by such plan amendment.

(B) The term "applicable pension plan" means—

(i) any defined benefit plan; or

(ii) an individual account plan which is subject

to the funding standards of section 412 of title 26.

(9) For purposes of this subsection, a plan amendment which eliminates or reduces any early retirement benefit or retirement-type subsidy (within the meaning of subsection (g)(2)(A) of this section) shall be treated as having the effect of reducing the rate of future benefit accrual.

(i) Prohibition on benefit increases where plan sponsor is in bankruptcy

(1) In the case of a plan described in paragraph (3) which is maintained by an employer that is a debtor in a case under title 11 or similar Federal or State law, no amendment of the plan which increases the liabilities of the plan by reason of—

(A) any increase in benefits,

(B) any change in the accrual of benefits, or

(C) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, shall be effective prior to the effective date of such employer's plan of reorganization.

(2) Paragraph (1) shall not apply to any plan amendment that—

(A) the Secretary of the Treasury determines to be reasonable and that provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(B) only repeals an amendment described in section 1082 (c)(8) of this title,

(C) is required as a condition of qualification under part I of subchapter D of chapter 1 of title 26, or

(D) was adopted prior to, or pursuant to a collective bargaining agreement entered into prior to, the date on which the employer became a

debtor in a case under title 11 or similar Federal or State law.

(3) This subsection shall apply only to plans (other than multiemployer plans) covered under section 1321 of this title for which the funded current liability percentage (within the meaning of section 1082 (d)(8) of this title) is less than 100 percent after taking into account the effect of the amendment.

(4) For purposes of this subsection, the term "employer" has the meaning set forth in section 1082 (c)(11)(A) of this title, without regard to section 1082 (c)(11)(B) of this title.

(j) Cross reference

For special rules relating to plan provisions adopted to preclude discrimination, see section 1053 (c)(2) of this title.

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[Page 652-661]

TITLE 26--INTERNAL REVENUE

CHAPTER I--INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
(CONTINUED)

PART 1_INCOME TAXES--Table of Contents

Sec. 1.411(b)-1 Accrued benefit requirements.

(a) Accrued benefit requirements--(1) In general. Under section 411(b), for plan years beginning after the applicable effective date of section 411, rules are provided for the determination of the accrued benefit to which a participant is entitled under a plan. Under a defined contribution plan, a participant's accrued benefit is the balance to the credit of the participant's account. Under a defined benefit plan, a participant's accrued benefit is his accrued benefit determined under the plan. A defined benefit plan is not a qualified plan unless the method provided by the plan for determining accrued benefits satisfies at least one of the alternative methods (described in paragraph (b) of this section) for determining accrued benefits with respect to all active participants under the plan. A defined benefit plan may provide that accrued benefits for participants are de-

termined under more than one plan formula. In such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods. A plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and this section. (For example, if a plan provides that employees who commence participation at or before age 40 accrue benefits in a manner which satisfies the 1331/3 percent method of determining accrued benefits and employees who commence participation after age 40 accrue benefits in a manner which satisfies the 3 percent method of determining accrued benefits, the plan would be so structured as to evade the requirements of section 411(b).) A defined benefit plan does not satisfy the requirements of section 411(b) and this section merely because the accrued benefit is defined as the "reserve under the plan". Special rules are provided for the first two years of service by a participant, certain insured defined benefit plans, and certain reductions in accrued benefits due to increasing age or service. In addition, a special rule is provided with respect to accruals for service before the effective date of section 411.

(2) Cross references--(i) 3 percent method. For rules relating to the 3 percent method of determining accrued benefits, see paragraph (b)(1) of this section.

(ii) 1331/3 percent method. For rules relating to the 1331/3 percent method of determining accrued benefits, see paragraph (b)(2) of this section.

(iii) Fractional method. For rules relating to the fractional method of determining accrued benefits, see paragraph (b)(3) of this section.

(iv) Accruals before effective date. For rules relating to accruals for service before the effective date of section 411, see paragraph (c) of this section.

(v) First 2 years of service. For special rules relating to determination of accrued benefit for first 2 continuous years of service, see paragraph (d)(1) of this section.

(vi) Certain insured plans. For special rules relating to determination of accrued benefit under a defined benefit plan funded exclusively by insurance contracts, see paragraph (d)(2) of this section.

(vii) Accruals decreased by increasing age or service. For special rules relating to prohibition of decrease in accrued benefit on account of increasing age or service, see paragraph (d)(3) of this section.

(viii) Separate accounting. For rules relating to requirements for separate accounting, see paragraph (e) of this section.

(ix) Year of participation. For definition of "year of participation", see paragraph (f) of this section.

(b) Defined benefit plans. A defined benefit plan satisfies the requirements of section 411(b)(1) and this paragrah for a plan year to which section 411 and this section apply if it satisfies the requirements of subparagraph (1), (2), or (3) of this paragraph for such year.

(1) 3 percent method--(i) General rule. A defined benefit plan satisfies the requirements of this paragraph for a plan year if, as of the close of the plan year, the accrued benefit to which each participant is entitled, computed as if the participant separated from the service as of the close of such plan year, is not less than 3 percent of the 3 percent method benefit, multi-

plied by the number of years (not in excess of 331/3) of his participation in the plan including years after his normal retirement age. For purposes of this subparagraph, the "3 percent method benefit" is the normal retirement benefit to which the participant would be entitled if he commenced participation at the earliest possible entry age for any individual who is or could be a participant under the plan and if he served continuously until the earlier of age 65 or the normal retirement age under the plan.

(ii) Special rules—(A) Compensation. In the case of a plan providing a retirement benefit based upon compensation during any period, the normal retirement benefit to which a participant would be entitled is determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subdivision (A), the number of consecutive years of service used in computing average compensation shall be the number of years of service specified under the plan (not in excess of 10) for computing normal retirement benefits.

(B) Social security, etc. For purposes of this subparagraph, for any plan year, social security benefits and all relevant factors used to compute benefits, e.g., consumer price index, are treated as remaining constant as of the beginning of the current plan year for all subsequent plan years.

(C) Computation in certain cases. In the case of any plan to which the provisions of section 411(b)(1)(D) and paragraph (c) of this section are applicable, for any plan year the accrued benefit of any participant shall not be less than the accrued benefit otherwise determined under this subparagraph, reduced by the excess of the ac-

crued benefit determined under this subparagraph as of the first day of the first plan year to which section 411 applies over the accrued benefit determined under section 411(b)(1)(D) and paragraph (c) of this section and increased by the amount determined under paragraph (c)(2)(v) of this section.

(iii) Examples. The application of this subparagraph is illustrated by the following examples.

Example (1). The M Corporation's defined benefit benefit plan provides an annual retirement benefit commencing at age 65 or $4 per month for each year of participation. As a condition of participation, the plan requires that an employee have attained age 25. The normal retirement age specified under the plan is age 65. The plan provides for no limit on the number of years of credited service. A, age 40, is a participant in the M Corporation's plan.

A has completed 12 years of participation in the plan of the M Corporation as of the close of the plan year. Under subdivision (i) of this subparagraph, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age (25) under the plan and served continuously until normal retirement age (65) is an annual benefit of $1,920 [40x(12x$4)]. Under paragraph (b)(1)(i) of this section, the plan does not satisfy the requirements of this subparagraph unless A has accrued an annual benefit of at least $691 [0.03x($1,920x12)] as of the close of the plan year. Under the M Corporation plan, A is entitled to an accrued benefit of $576 [(12x12)x$4] as of the close of the plan year. Thus, with respect to A, the accrued benefit provided under the M Corporation plan does not satisfy the requirements of this subparagraph.

Example (2). Assume the same facts as in example (1) except that the M Corporation's plan provides that only the first 30 years of participation are taken into account. Under subdivision (i) of this subparagraph, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age under the plan (25) and served continuously until normal retirement age (65) is an annual benefit of $1.440 [30x$48]. Under paragraph (b)(1)(i) of this section, the plan does not satisfy the requirements of this subparagraph unless A has accrued an annual benefit of at least $518 [0.03x($1,440x12)] as of the close of the plan year. Under the M Corporation plan, A is entitled to an accrued benefit of $576 [(12x$48]. Thus, with respect to A, the accrued benefit provided under the M Corporation plan satisfies the requirements of this subparagraph.

Example (3). The N Corporation's defined benefit plan provides an annual retirement benefit commencing at age 65 of 50 percent of average compensation for the highest 3 consecutive years of compensation for an employee with 25 years of participation. A participant who separates from service before age 65 is entitled to 2 percent of average compensation for the highest 3 consecutive years of compensation for each year of participation not in excess of 25. The plan has no minimum age or service requirement for participation. The normal retirement age specified under the plan is age 65. On December 31, 1990, B, age 40, is a participant in the N Corporation's plan. B began employment with the N Corporation and became a participant in the N Corporation's plan on January 1, 1980. Under this subparagraph, the normal retirement benefit to which a participant would be entitled if he commenced participa-

tion at the earliest possible entry age (0) under the plan and served continuously until normal retirement age (65) is 50 percent of average compensation for the highest 3 consecutive years of compensation per year commencing at age 65. Under this subparagraph, B must have accrued an annual benefit of at least 16.5 percent of his highest 3 consecutive years of compensation per year commencing at age 65 [0.03x50 percent of average compensation for the highest 3 consecutive years of compensationx11] as of the close of the plan year. Under the N Corporation plan, B has accrued an annual benefit of 22 percent of average compensation for his highest 3 consecutive years of compensation per year commencing at age 65. Thus, with respect to B, the accrued benefit under the N Corporation plan satisfies the requirements of this subparagraph.

Example (4). The P Corporation's defined benefit plan provides an annual retirement benefit commencing at age 65 of 50 percent of average compensation for the 3 consecutive years of compensation from the P Corporation next preceding normal retirement age.

The plan has no minimum age or service requirement for participation.

The normal retirement age under the plan is age 65. On December 31, 1990, C, age 55, separates from service with the P Corporation. C began employment with the P Corporation and became a participant in the P Corporation's plan on January 1, 1980. As of December 31, 1990. C's average compensation for the 3 consecutive years preceding his separation from service is $15,000. Under this subparagraph, the normal retirement benefit to which a participant would be entitled if he commenced participation at the earliest possible entry age (0) under the plan and served continuously until

normal retirement age (65) is an annual benefit of 50 percent of average compensation for the 3 consecutive years of compensation from the P Corporation next preceding normal retirement age commencing at age 65. C must have accrued an annual benefit of at least $2,475 commencing at age 65 [0.03x(0.050x$15,000)x11] as of his separation from the service with the P Corporation in order for the P Corporation's plan to satisfy the requirements of this subparagraph with respect to C.

Example (5). On December 31, 1985, the R Corporation's defined benefit plan provided an annual retirement benefit commencing at age 65 of $100 for each year of participation, not to exceed 30. As a condition of participation, the plan requires that an employee have attained age 25. The normal retirement age specified under the plan is age 65. The appropriate computation period is the calendar year. On January 1, 1986, the plan is amended to provide an annual retirement benefit commencing at age 65 of $200 for each year of participation (before and after the amendment), not to exceed 30. B, age 40, is a participant in the R Corporation's plan. B has completed 15 years of participation in the plan of the R Corporation as of December 31, 1990. Under paragraph (b)(1)(i) of this section, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age (25) under the plan an served continuously until normal retirement age (65) is an annual benefit of $6,000 [30x200]. Under subdivision (i) of this subparagraph, the plan does not satisfy the requirements of this subparagraph unless B has accrued an annual benefit of at least $2,700 [0.03x$6,000x15] as of December 31, 1990. Under the R

Corporation plan, B is entitled to an accrued benefit of $3,000 [$200x15] as of December 31, 1990. Thus, with respect to B, the accrued benefit provided under the R Corporation plan satisfies the requirements of this subparagraph.

Example (6). On December 31, 1995, the J Corporation's defined benefit plan provided an annual retirement benefit commencing at age 65 of $4,800 after 30 years of participation. The normal retirement age specified under the plan is age 65. The appropriate computation period is the calendar year. On January 1, 1996, the plan is amended to provide an annual retirement benefit commencing at age 65 of $6,000. A, age 40, is a participant in the J Corporation's plan since its adoption on January 1, 1986. Under paragraph (b)(1)(i) of this section, on December 31, 1995, the normal retirement benefit commencing at age 5 to which a participant would be entitled if he commenced participation at the earliest possible entry age (0) under the plan and served continuously until normal retirement age (65) is an annual benefit of $4,800. Under paragraph (b)(1)(i) of this section, on January 1, 1996, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age (0) under the plan and served continuously until normal retirement age (65) is an annual benefit of $6,000. Under subdivision (i) of this subparagraph, the plan does not satisfy the requirements of this subparagraph unless A has an accrued benefit on December 31, 1995 of at least $1,440 [$4,800x0.02x10] and an accrued benefit on January 1, 1996 of at least $1,800 [$6,000x0.03x10].

Example (7). The X Company's defined benefit plan provides an annual retirement benefit commencing at

age 65 of $4 per month for each year of participation (not to exceed 30). As a condition of participation, the plan requires that an employee have attained age 25. The normal retirement age specified under the plan is age 65. D, age 68, is a participant in the X Company's plan. D has completed 20 years of participation in the X Company plan as of the close of the plan year.

Under paragraph (b)(1)(i) of this section, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age (25) under the plan and served continuously until normal retirement age (65) is an annual benefit, commencing at age 65, of $1,440 [30x$48]. Under paragraph (b)(1)(i) of this section, the plan does not satisfy the requirements of this subparagraph unless D has accrued an annual benefit, commencing at age 65, of $864 [0.03x$1,440x20] as of the close of the plan year. Under the X Company plan, D has accrued an annual benefit, commencing at age 65, of $960 [20x$48]. Thus, with respect to D the accrued benefit provided under the X Company plan satisfies the requirements of this subparagraph.

Example (8). Assume the same facts as in example (7) except that for purposes of determining accrued benefits under the plan the X Company's plan disregards all years of participation after normal retirement age.

Under paragraph (b)(1)(i) of this section, the normal retirement benefit commencing at age 65 to which a participant would be entitled if he commenced participation at the earliest possible entry age (25) under the plan and served continuously until normal retirement age (65) is an annual benefit of $1,440 [30x$48]. Under paragraph (b)(1)(i) of this section the plan does not satisfy the requirements of this subparagraph unless D

has accrued an annual benefit, commencing at age 65, of $864 [0.03x$1,440x20] as of the close of the plan year. Under the X Company's plan D has accrued an annual benefit commencing at age 65, of $816 [17x$48]. Thus, with respect to D, the accrued benefit provided under the X Company plan does not satisfy the requirements of this subparagraph.

(2) 1331/3 percent rule--(i) General rule. A defined benefit plan satisfies the requirements of this subparagraph for a particular plan year if--

(A) Under the plan the accrued benefit payable at the normal retirement age (determined under the plan) is equal to the normal retirement benefit (determined under the plan), and

(B) The annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year cannot be more than 1331/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

(ii) Special rules. For purposes of this subparagraph--

(A) Plan amendments. Any amendment to the plan which is in effect for the current plan year shall be treated as if it were in effect for all other plan years.

(B) Change in accrual rate. Any change in an accrual rate which change does not apply to any individual who is of could be a participant in the plan year is disregarded. Thus, for example, if for its plan year beginning January 1, 1980, a defined benefit plan provides an accrued benefit in plan year 1980 of 2 percent of a participant's average compensation for his highest 3 years of compensation for each year of service and provides that in plan year 1981 the accrued benefit will be

3 percent of such average compensation, the plan will not be treated as failing to satisfy the requirements of this subparagraph for plan year 1980 because in plan year 1980 the change in the accrual rate does not apply to any individual who is or could be a participant in plan year 1980. However, if, for example, a defined benefit plan provided for an accrued benefit of 1 percent of a participant's average compensation for his highest 3 years of compensation for each of the first 10 years of service and 1.5 percent of such average compensations for each year of service thereafter, the plan will be treated as failing to satisfy the requirements of this subparagraph for the plan year even though no participant is actually accruing at the 1.5 percent rate because an individual who could be a participant and who had over 10 years of service would accrue at the 1.5 percent rate, which rate exceeds 1331/3 percent of the 1 percent rate.

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TITLE 26--INTERNAL REVENUE

CHAPTER I--INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
(CONTINUED)

PART 1_INCOME TAXES--Table of Contents

Sec. 1.411(d)-3 Other special rules.

(a) Class year plans--(1) General rule. Under section 411(d)(4), the requirements of section 411(a)(2) for a class year plan shall be deemed to be satisfied if such plan provides that each employee's rights to or derived from employer contributions on his behalf for any plan year are nonfor feitable no later than the end of the 5th plan year following the plan year for which such contributions were made. For purposes of section 411 and the regulations thereunder, the term "class year plan" means a profit-sharing, stock bonus, or money purchase plan which provides that the nonforfeitable rights of employees to or derived from employer contributions are determined separately for each plan year.
"See Sec. 1.411(d)-5 for rules that apply to class year plans for contributions made for plan years beginning after October 22, 1986."

(2) Other rules--(i) Prohibited forfeiture on withdrawals. In the case of a class year plan, section

401(a)(19) and the regulations thereunder shall be applied separately to each plan year.

(ii) Distribution rules. The rules of Sec. 1.411(a)-7(d) apply to a class year plan. For example, under the rule in Sec. 1.411(a)-7(d)(2)(ii)(D), a class year plan would be permitted to limit the time of repayment to a 5-year period beginning on the date of withdrawal, or under the rule in Sec. 1.411(a)-7(d)(2)(iii), a class year plan would restore the amount of the forfeited account balance in the event of repayment. For purposes of applying subparagraphs (2) and (3) of Sec. 1.411(a)-7(d), relating to withdrawal of mandatory contributions, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time. Any repayments shall be treated as being on account of plan years in succeeding order of time. For purposes of applying any rule of such paragraph (e.g., paragraph (d)(2)(ii)(C)) the term "one-year break in service" means any plan year in which under subparagraph (1) of this paragraph a class year plan may forfeit an employee's rights.

(iii) Computation of years for withdrawals. In applying the requirement of paragraph (a)(1) of this section that rights must be nonforfeitable no later than the end of the fifth plan year following the plan year for which contributions are made, any plan year for which there has been a withdrawal of contributions and no repayment of such contributions (determined as of the last day of the plan year) is not required to count toward the five years. For example, assume that contributions are made for A in 1981 to a calendar year plan. Under the general rule of paragraph (a)(1) of this section, the contributions must be nonforfeitable on December 31, 1986. If in 1982, A withdraws the contributions for 1981, and repays these contributions in 1984, 1982 and 1983

are not required to be counted toward the five years because at the end of each year there is a withdrawal and no repayment of such withdrawal.

Accordingly, the plan must provide that A's interest in the contribution for 1981 will be vested on December 31, 1988.

(b) Prohibition against accrued benefit decrease. Under section 411(d)(6) a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, unless the plan amendment satisfies the requirements of section 412(c)(8) (relating to certain retroactive amendments) and the regulations thereunder. For purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment.

Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits.

(c) Rules applicable to section 414(k) plan. For special rules applicable to defined benefit plans which provide a benefit derived from employer contributions which is based partly on a participant's separate account, see section 414(k) and the regulations thereunder.

(Sec. 411 (88 Stat. 901; 26 U.S.C. 411))

[T.D. 7501, 42 FR 42340, Aug. 23, 1977, as amended by T.D. 8038, 50 FR 29375, July 19, 1985; T.D. 8219, 53 FR 31854, Aug. 22, 1988; 53 FR 48534, Dec. 1, 1988]

Supreme Court, U.S.
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No. 05-291

IN THE

Supreme Court of the United States

MYRON G. KING,

Petitioner,

v.

PENSION TRUST FUND OF THE PENSION, HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY, and THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly rejected Petitioner's breach of fiduciary duty claim under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3), when it is undisputed that Petitioner neither relied on the alleged misrepresentation nor suffered any injury?

2. Whether the Second Circuit properly concluded that Petitioner lacked standing to challenge the lawfulness of a plan amendment in order to obtain a retroactive increase in the value of his pension credits when the amendment as applied to Petitioner's own service under the pension plan did not violate the law but where Petitioner claimed the application of the amendment to two *nonparty* participants was unlawful?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Summary of Argument	1
Statement of the Case and Course of Proceedings	2
A. Factual Overview	2
B. Legal Overview	4
1. ERISA's Cut-Back Prohibition	4
2. ERISA's Backloading Rules	4
C. The District Court's Summary Judgment Decision	7
D. The Second Circuit's Unpublished Summary Order	9
Reasons for Denying the Petition	10
I. The Unpublished Decision Lacks Precedential Value	10

Contents

Page

II. The Unpublished Decision Does Not Create A Circuit Conflict 11

A. The "Faulty SPD" Conflict Is Not At Issue In This Case 11

B. No Conflict Exists On The Injury-In-Fact Requirement Of Standing 12

III. Granting The Petition Would Not Increase King's Benefits 16

IV. The Case Was Correctly Decided 18

A. King Has No Actionable Injury 18

B. King's View of Standing Would Eviscerate ERISA's Exhaustion Requirement 20

V. The Factual Dispute Over When The Split-Rate Amendment First Applied To The Standard Pension Makes This Case Inappropriate For Supreme Court Review 21

VI. King's Request For Statutory Penalties Does Not Present An Issue For Review 22

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Blum v. Yaretsky, 457 U.S. 991 (1982) 10, 12

Burke v. Kodak Retirement Income Plan, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004) 11

Campanella v. Mason Tenders' Dist. Council Pension Plan, 132 Fed. App. 855 (2d Cir. 2005) 6

Carollo v. Cement and Concrete Workers Dist. Council Pension Plan, 964 F. Supp. 677 (E.D.N.Y. 1997) 5

Davenport v. Harry N. Abrams, Inc., 249 F.3d 130 (2d Cir. 2001) 20

DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund, 975 F.Supp. 258 (S.D.N.Y. 1997) 5

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 21

Gluck v. Unisys Corp., 960 F.2d 1168 (3d Cir. 1992) 15

Helms v. Local 705 Int'l Bhd. of Teamsters Pension Plan, No. 97 C 4788 (Pallmeyer, J.), 1999 WL 965230 (N.D. Ill. Sept. 30, 1999) 4

Cited Authorities

Page

Int'l Union of Electronic, Electric, Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc., 980 F.2d 889 (3d Cir. 1992) 15

Johnson v. Allsteel, Inc., 259 F.3d 885 (7th Cir. 2001) 12, 13, 14, 15

LaFlamme v. Carpenters Local # 370 Pension Plan, 127 Fed. App. 3 (2d Cir. 2005) 7

Langman v. Laub, 328 F.3d 68 (2003), *cert. denied*, 540 U.S. 1107 (2004) 6, 8

Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994) 15

Mauser v. Raytheon Co. Pension Plan for Salaried Employees, 239 F.3d 51 (1st Cir. 2001) 23

Melvin v. U.A. Local 13 Pension Plan, 131 Fed. App. 737 (2d Cir. 2005) 7

Peterson v. Cont'l Cas. Co., 282 F.3d 112 (2d Cir. 2002) 20

Sampson v. Rubin, No. Civ.A. 00-10215-DPW, 2002 WL 31432701 (D. Mass. Oct. 29. 2002) 19

Varity Corp. v. Howe, 516 U.S. 489 (1996) 18, 19

Cited Authorities

Page

Watson v. Deaconess Waltham Hospital, 298 F.3d 102 (1st Cir. 2002) 23

Ziegler v. Connecticut General Life Ins. Co., 916 F.2d 548 (9th Cir. 1990) 16

Statutes, Regulations and Rules:

29 U.S.C. § 1024(b)(4) 9

29 U.S.C. § 1054(b)(1)(A)-(C) 5

29 U.S.C. § 1054(b)(1)(B) 5

29 U.S.C. § 1054(g)(1) 4, 16

29 U.S.C. § 1054(h) 17

29 U.S.C. § 1082(c)(8) 17

29 U.S.C. § 1132(a)(3) ..... i, 16, 17, 19, 22

29 U.S.C. § 1132(c) 9, 22

Treas. Reg. § 1.411(d)-3(b) 17

Rule § 0.23 of the Second Circuit's Local Rules Relating to the Organization of the Court 10

Cited Authorities

Page

Treatises:

Stephen R. Bruce, *Pension Claims: Rights and Obligations* (2d ed. 1993) 5

Felicia A. Finston & Stephen J. Gilles, 351-3rd T.M., *Plan Qualification – Pension and Profit-Sharing* Plans 5

SUMMARY OF ARGUMENT

The Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry (the "Plan"), and the Joint Industry Board of the Electrical Industry (the "Joint Board") (collectively, "Respondents") submit this brief in opposition to the petition for a writ of certiorari (the "Petition") filed by Myron G. King ("Petitioner" or "King").

Petitioner sued Respondents to have a $55 benefit rate in effect in 1999 applied to his 21 pension credits earned between 1955 and 1977 on account of his return to Covered Employment in 1998 after a 22-year absence. He argued that valuing his first 21 credits at the rate in effect when he worked violated ERISA's cut-back and backloading prohibitions. The District Court rejected both claims. On appeal Petitioner abandoned his contention that *his* benefit calculation violated ERISA, and instead argued for the first time that Respondents improperly calculated the benefits of two *nonparties*. The Second Circuit held that Petitioner did not have standing to raise claims regarding nonparties' benefits, and affirmed the District Court's decision. Additionally, Petitioner unsuccessfully sought both equitable relief and statutory penalties for an alleged breach of fiduciary duty under ERISA based on a factual dispute between the parties regarding the effective date of a plan amendment. The Petition asks the Court to review the Second Circuit's standing decision as well as the rejection of his fiduciary breach claim.[1]

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1. The District Court's memorandum and order and the Second Circuit's summary order are reproduced in the appendix to the Petition, cited as "Pet'r App. at __."

This case is unworthy of Supreme Court review. First, Petitioner exaggerates the importance of this case which is nothing more than an attempt to secure a windfall in his pension based on a set of unique plan provisions and the specific work history of Petitioner and two other individuals who are not parties to this case. Second, the Second Circuit's decision is an unpublished summary order which cannot be cited to any court and has no precedential value. Third, the decision creates no conflict among the circuits. Fourth, Petitioner's claims rest on a factual issue regarding the date a specific plan amendment applied to a specific type of pension that was disputed by the parties below and that the Second Circuit did not reach. Finally, Petitioner's cut-back and backloading claims fail on the merits.

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

A. Factual Overview

King earned 21 pension credits under the Plan between 1955 and 1976. Following a 22-year absence from Covered Employment, he earned one additional credit between 1998 and 1999, and ultimately retired with a pension based on 22 credits. (Pet'r App. at 14a-15a). For participants who have two or more distinct periods of employment, like King, the Plan provides for a "split-rate" calculation pursuant to which the earlier period of credit is valued at the rate in effect when the participant first left Covered Employment, and the later period of credit is valued at the rate in effect at retirement. (*Id.* at 10a). In this case, the applicable rate for King's earlier

period is $8.50,[2] and $55 for his last year before retirement. (*Id.* at 15a). As discussed below, in a number of cases where participants have asserted that ERISA requires retroactive increases for all service, the Second Circuit has held that benefit increases need not be retroactive for all prior years and that split-rate provisions are lawful under ERISA, a holding not challenged by Petitioner. This Plan's split-rate provision does permit the higher rate in effect at retirement to be applied retroactively to all of a participant's credits if the participant's return to Covered Employment after an absence is for (a) at least two years, and (b) at least as long as the absence. (*Id.* at 9a-13a, 34a). This is the "repair" or "cure" feature of the split-rate provision. Based on King's work history, however, King was not eligible for the repair because his one-year return to Covered Employment was neither two years nor as long as his 22-year absence. As a result, the $55 rate in effect in 1999 did not apply to his earlier pension credits.

After an unsuccessful administrative appeal to the Joint Board, King brought this suit alleging that not valuing his 21 credits at the 1999 rate violated ERISA's cut-back and backloading prohibitions, and that the Joint Board's response to his request for the "1992 plan document" constituted a fiduciary misrepresentation.

---

2. In fact, the rate when King worked was less than $8.50 but the Plan retroactively increased the value of all prior service in 1989 to $8.50. (Pet'r App. at 9a, 28a).

B. Legal Overview

1. ERISA's Cut-Back Prohibition

Section 204(g)(1) of ERISA, 29 U.S.C. § 1054(g)(1), prohibits the accrued benefit of a participant under a plan from being decreased or cut back by plan amendment. For example, if a plan provides for a unit benefit rate of $55 per credit earned in 1995, the plan may not be amended in 2000 to decrease the $55 rate.

2. ERISA's Backloading Rules

The practice of backloading refers to a pension plan formula that substantially increases the rate of benefit accrual in the later years of an employee's service or that defers significant benefit accruals until late in an employee's career. An extreme example of a backloaded plan would be a plan that provided a participant with 0 percent of his normal retirement benefit during the first 20 years of participation and 100 percent of his benefit after he completes 21 years of participation in the plan, thereby leaving the participant with an accrued benefit of zero after 20 years and an accrued benefit equal to the normal retirement benefit under the plan after 21 years of participation. Congress prohibited excessive backloading in ERISA in order to prevent employers from undermining the statutory vesting requirements by making benefits accrue so slowly in an employee's early years of service that his or her pension rights, even though vested in accordance with ERISA, have very little value until the participant has completed many years of service.[3]

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3. *See generally Helms v. Local 705 Int'l Bhd. of Teamsters Pension Plan*, No. 97 C 4788 (Pallmeyer, J.), 1999 WL 965230, *14

(Cont'd)

In order to prevent excessive backloading, plans must comply with one of three minimum accrual schedules that require a plan to give ratable credit for all of a participant's years of participation.[4] In this case, the Plan satisfies the 133-1/3 percent accrual schedule set forth in ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), which measures the accrual rate under a plan for a given year against the accrual rate for all subsequent years. (Pet'r App. at 37a). The test is satisfied if a subsequent year's accrual does not exceed 133-1/3 percent of a prior year's accrual. For a plan such as this Plan that provides an annual unit rate of benefit accruals, such as $55 per year of credit, this method requires either a single benefit rate or, if there are multiple rates, that the rate in any later year not be more than 133-1/3 percent of the rate in any earlier year. Stephen R. Bruce, *Pension Claims: Rights and Obligations* (2d ed. 1993) (reproduced at A-804 to A-805); Felicia A. Finston & Stephen J. Gilles, 351-3rd T.M., *Plan Qualification – Pension and Profit-Sharing Plans*, at A-52 (reproduced at A-796).

The concern underlying ERISA's backloading rules is not implicated by split-rate provisions which do not tie benefit increases to an employee's length of service, but instead merely limit the retroactive application of benefit

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(Cont'd)

(N.D. Ill. Sept. 30, 1999); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 268 (S.D.N.Y. 1997); *Carollo v. Cement and Concrete Workers Dist. Council Pension Plan*, 964 F. Supp. 677, 681 (E.D.N.Y. 1997).

4. *See* Section 204(b)(1)(A)-(C) of ERISA, 29 U.S.C. § 1054(b)(1)(A)-(C) (setting forth three alternative accrual schedules: the 3 percent accrual schedule, the 133-1/3 percent accrual schedule, and the fractional schedule).

increases. This conclusion was confirmed in *Langman v. Laub*, 328 F.3d 68 (2003), *cert. denied*, 540 U.S. 1107 (2004). In that case, the Second Circuit stated:

> [Plaintiff] asserts that since the $50 benefit rate used to calculate his pension benefits for the later years is more than 133 1/3 percent of the benefit rate used to calculate his pension benefit for the earlier years, defendants' calculation – and, more generally, the [split-rate] provisions on which it is premised – violates the 133 1/3 percent test.
>
> This argument, however, completely misapprehends the acknowledged purpose of the 133 1/3 percent test, which is to prevent . . . "backloading of benefits". . . . [T]he test applies to how a given plan operates at a given time and prevents it from being unfairly weighted against shorter-term employees; but it is irrelevant to across-the-board increases in benefit rates made at some future time on behalf of all current employees regardless of period of service. Indeed, it would be a strange rule that would prohibit a fund from making more than a one-third increase in its across-the-board benefit rate unless that rule were retroactively applied to all former employees; yet this would be the effect of plaintiff's interpretation. Accordingly . . . defendants did not violate the 133 1/3 percent test by pro rating his monthly benefit in accordance with the Plan's [split-rate] provisions.

Id. at 71-72 (citations omitted). *See also Campanella v. Mason Tenders' Dist. Council Pension Plan*, 132 Fed. App. 855, 857 (2d Cir. 2005) (applying *Langman* to dismiss

backloading allegations); *Melvin v. U.A. Local 13 Pension Plan*, 131 Fed. App. 737, 739 (2d Cir. 2005) (same); *LaFlamme v. Carpenters Local # 370 Pension Plan*, 127 Fed. App. 3, 15 (2d Cir. 2005) (same).

C. The District Court's Summary Judgment Decision

King's attempt to have his earlier credits retroactively increased to the rate in effect more than 20 years later focused on the date that the split-rate amendment was added to the Plan, a sharply disputed issue in the proceedings below. Specifically, Respondents maintained that the split-rate provision applied to all pension types offered under the Plan (Early, Standard, Normal, Vested) beginning in 1989, whereas King argued that in 1989 the split-rate provision applied to only one type of pension, the so-called Vested Pension, and did not become applicable to the Standard Pension that he was awarded until 1995. (Pet'r App. at 10a-13a, 24a). King also claimed that because he had already accumulated 21 pension credits in 1995 when he believed the amendment first applied to the Standard Pension, and the unit benefit rate at that time was $50, his accrued benefit in 1995 was $1,050 (21 credits multiplied by $50). Therefore, even though he had not worked under the Plan since 1976, King claimed that applying the $8.50 rate to his first 21 credits unlawfully reduced his accrued benefit. (*Id.* at 27a-28a).

The District Court accepted King's position that the split-rate provision first applied to the Standard Pension in 1995. However, because King had not returned to Covered Employment until 1998, this factual determination did not help him. The District Court held instead that King was not entitled to the $50 rate in effect in 1995 because of a different

section in the Plan that provided that a participant's benefit is determined under the Plan in effect when he separates from Covered Employment. Accordingly, the District Court held that, until King returned to Covered Employment, the $8.50 rate applied to his earlier service under the Plan, and his benefit was not cut back by the 1995 split-rate amendment. (*Id.*)

King also argued that the application of the two different rates, $8.50 and $55, to calculate his benefit constituted unlawful backloading because the $55 rate was more than 133-1/3 percent of the $8.50 rate. The District Court held that this argument was foreclosed by *Langman*, which was decided after the parties had moved for summary judgment, and rejected King's effort to distinguish *Langman* based on the repair provision which was not at issue in *Langman*. (*Id.* at 32a-37a).

King also challenged the Joint Board's response to King's pre-litigation requests for documents. Specifically, King had requested "the 1992 Pension Fund Plan Document," to which the Joint Board responded by providing the Plan document that was drafted in 1995 and effective retroactively to 1989 in compliance with Internal Revenue Service regulations. It is undisputed that there is no Plan that bears a 1992 date. In addition, in response to King's questions about the split-rate amendment, the Joint Board provided King with a copy of the applicable split-rate section, stating that "[t]he appropriate provision was adopted . . . in 1989." (*Id.* at 39a-41a).

The District Court agreed with King that the Joint Board's response regarding the date of the amendment was misleading to the extent that it implied that the split-rate provision applied to the Standard Pension in 1989 since that

was contrary to the District Court's factual finding (made in 2003) that the provision did not apply to the Standard Pension until 1995. However, because King had not relied on the Joint Board's response, the District Court rejected his fiduciary breach claim under ERISA. The District Court also rejected King's request for statutory penalties under ERISA Section 502(c), 29 U.S.C. § 1132(c), based on the production of the Plan document drafted in 1995 but made retroactive to 1989 in response to King's request for a 1992 plan document. The District Court declined to award any penalties because the Joint Board had, in fact, and as a matter of law, met its disclosure obligations under ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4). (*Id.*).

D. The Second Circuit's Unpublished Summary Order

On appeal, King did *not* challenge the District Court's holding that *his* benefit was not unlawfully reduced or improperly backloaded, but instead raised for the first time the argument that two *nonparties*, so-called Pensioner #1 and Pensioner #2, respectively, had their benefits unlawfully reduced and backloaded. Notably, King had not sued as a class action or on behalf of anyone other than himself, none of his three complaints requested an adjudication concerning Pensioner #1 or #2, and neither nonparty ever appealed their benefit awards to the Joint Board. In fact, the only relevance of Pensioner #1 and #2 in this litigation is that Respondents produced worksheets of their work histories and benefit calculations in discovery.

The Second Circuit affirmed the District Court's judgment in an unpublished summary order. With respect to the cut-back claim, the Court of Appeals applied fundamental

standing principles set forth in *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982), to hold that since King's benefits had not been decreased, King had not personally suffered any injury and, therefore, lacked standing to argue about Pensioner #1. (Pet'r App. at 3a). With respect to the backloading claim, although the Second Circuit did not comment on the District Court's holding that the repair feature of the split-rate provision was permissible under ERISA, the Court of Appeals rejected the claim due to King's lack of standing. It stated that because King had only returned to Covered Employment for one year he was "decades away from being deterred from leaving employment by the incentives created by the 'repair' provision," noting that "[i]t is the impact of such deterrence that would be the basis for his standing to raise this issue." (Pet'r App. at 3a-4a). Finally, the Court affirmed the District Court's rejection of King's fiduciary breach claim because of King's admitted lack of reliance. The Court did not address King's claim for ERISA Section 502(c) penalties. (*Id.* at 4a).

REASONS FOR DENYING THE PETITION

I. The Unpublished Decision Lacks Precedential Value

The Second Circuit's decision is an unpublished summary order. Under the Second Circuit's rules, summary orders "do not constitute formal opinions of the court . . . and shall not be cited or otherwise used in unrelated cases before this or any other court." Rule § 0.23 of the Second Circuit's Local Rules Relating to the Organization of the Court. For this threshold reason, review is not warranted. Since the Second Circuit itself does not view the case as an important matter and expressly prohibits any citation of the order, the decision cannot create any genuine conflict nor did it articulate a new principle of law on standing.

II. The Unpublished Decision Does Not Create A Circuit Conflict

King tries to support his Petition by alleging two conflicts, the first concerning whether reliance or prejudice is required to prevail in benefit claim cases based on faulty SPDs, and the second involving standing under ERISA. As shown below, the first conflict is not presented in this case, and the second conflict is spurious.

A. The "Faulty SPD" Conflict Is Not At Issue In This Case

The courts below dismissed King's fiduciary breach claim based on the Joint Board's allegedly misleading response to King's document request because King did not rely on the alleged misrepresentation. Petitioner fails to identify any conflict on the question of whether reliance is required for a fiduciary misrepresentation claim. Instead, Petitioner identifies an irrelevant circuit court conflict on whether ERISA requires a participant to demonstrate detrimental reliance upon deficient summary plan descriptions ("SPDs") in order to recover benefits. *See, e.g.*, *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 112 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004) (reviewing conflicting circuit court holdings in faulty SPD cases).

The conflict described in *Burke* does not support the Petition for the simple reason that this case is not about a faulty SPD. In this case, the Joint Board's allegedly misleading representation was its representation that the split-rate amendment was added to the Plan for Standard Pensions in 1989. King has never alleged that any of the Plan's SPDs were deficient, and neither court below made any such finding

as reflected in the fact that neither decision cited any faulty SPD cases. Therefore, resolving the circuit court conflict on whether reliance is required to obtain benefits based on a faulty SPD would not dispose of the case at bar and would not benefit King in any way.

B. No Conflict Exists On The Injury-In-Fact Requirement Of Standing

Petitioner's claim that the Second Circuit's order creates a conflict with another circuit is mistaken. The Panel's decision merely applied fundamental well-settled constitutional principles of standing as articulated in this Court's decision in *Blum* that Article III of the Constitution requires a plaintiff to show "'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" in order for a federal court to exercise jurisdiction over a dispute, and that "[i]t is not enough that the conduct of which the plaintiff complains will injure *someone*." *Blum*, 457 U.S. at 999 (internal citations omitted) (emphasis in the original). The summary order does not distinguish or reject, either overtly or implicitly, any appellate precedent or impose any new limitations on standing. The cases cited by King as demonstrating a conflict are readily distinguishable on their facts and do not require a different result than that reached by the Second Circuit.

In *Johnson v. Allsteel, Inc.*, 259 F.3d 885 (7th Cir. 2001), the principal case relied upon by King to demonstrate a conflict, the plan at issue could be amended only by the agreement of both the plaintiff's employer and his union. Disregarding this limitation, the employer amended the plan without the union's consent to give the company the unilateral right to amend the plan, and then it amended the plan again

to grant itself unfettered discretion to review all questions arising under the plan. *Id.* at 887. The plaintiff claimed he was injured by the employer's grant of additional discretion under the amendment. The Seventh Circuit held that the plaintiff had demonstrated an injury-in-fact even though the employer had not yet adversely exercised its discretion toward him. The court stated:

> By adding language that granted itself discretionary authority to determine eligibility under and to construe the Plan, Allsteel increased the likelihood that [plaintiff] will, at some point, be denied benefits under the Plan. This correspondingly decreased the certainty of his Plan entitlements, *causing him immediate injury*. Thus we conclude that [plaintiff] has sufficiently alleged injury-in-fact.

Id. at 890 (emphasis added).

Allsteel is easily distinguishable. King's return to Covered Employment in 1998, after the date according to the District Court that the split-rate amendment applied to the Standard Pension, meant that the split-rate amendment not only did not injure him immediately by reducing his accrued benefit upon his return, but also that the amendment would *never* injure him. This is so because until he returned to Covered Employment, as the District Court found, his benefits were determined under the Plan in effect in 1976 when he first terminated Covered Employment. (Pet'r App. at 27a-28a). Thus, Petitioner here differs from the plaintiff in *Allsteel* who could demonstrate a genuine prospective injury to him, *i.e.*, the potential narrowing of *his* own entitlement to benefits in the future. Unlike Petitioner here,

the plaintiff in *Allsteel* did not argue that *another* plan participant could have benefits denied in the future under the amended discretionary standard. Since Petitioner here has no actual or threatened cut-back, *Allsteel* is not inconsistent with the Panel's decision.

Allsteel is also readily distinguishable on its facts with respect to Petitioner's backloading claim. King argues that under the Seventh Circuit's analysis in *Allsteel* he would be allowed to challenge the repair feature of the split-rate provision as causing unlawful backloading, but that the Second Circuit requires him instead to face an imminent injury in order to have standing. In fact, however, the Second Circuit's summary order does not require imminent deterrence from leaving Covered Employment in order to raise a backloading challenge to the repair. Instead, it simply held on the specific facts of the case that King lacked standing because, unlike the plaintiff in *Allsteel*, King would never have the potential problem of being deterred from leaving Covered Employment even in the future as he had already left Covered Employment. Nothing in the Second Circuit's decision precludes a current employee, even one with only one or a few years of credit, from complaining that he could potentially be deterred from leaving employment in the future because of a backloaded plan design that requires him to continue working in order to reap the full value of his earlier service. King was not in that position because he had terminated Covered Employment

In any event, even if King had standing to argue that the repair feature makes an otherwise lawful split-rate provision unlawful, no authority supports Petitioner's view that the repair feature results in improper backloading. Other than the District Court, no court has considered such a challenge,

and the District Court's holding that the repair feature did not cause backloading because it does "concentrate the accrual of benefits on any fixed tenure of employment or on a benchmark linked to the approach of retirement, but rather focus[es] on a wholly different feature: the length of the ill-timed (in hindsight) break in service" was correct. (Pet'r App. at 36a-37a).

The three statute of limitation cases relied upon by King also fail to prove a conflict between circuit courts in need of resolution by the Supreme Court. In those cases, it was undisputed that the plaintiffs, unlike King, were harmed by the challenged act, and the only question was whether the statute of limitations began to run on the date the potential for injury first existed or on the date of the actual injury. *See Larson v. Northrop Corp.*, 21 F.3d 1164, 1170-72 (D.C. Cir. 1994) (statute of limitations began to run on date that defendants purchased insufficient annuity contract and not on date of payment under contract); *Int'l Union of Electronic, Electric, Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*, 980 F.2d 889, 898-99 (3d Cir. 1992) (limitations period began on date of adoption of unlawful amendment); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178-79 (3d Cir. 1992) (same). Like Petitioner's misplaced reliance on *Allsteel*, these cases do not conflict with the Second Circuit's decision that Petitioner lacked standing since Petitioner, alone, unlike the plaintiffs in the cited cases, did not have any actual or threatened injury. None of these cases supports King's novel proposition that an allegedly unlawful action need not have any actual or threatened effect on the plaintiff for there to be standing, or that the plaintiff can challenge the action based solely on its effect on someone else.

The fourth case cited by King to support his conflict claim is completely inapposite as it involves a prohibited transaction under ERISA, a *per se* statutory violation that does not require any showing of injury. *Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548, 550-52 (9th Cir. 1990) (limitations period began to run when plan entered into unlawful arrangement with investment manager, and not when unlawful act actually occurred under agreement). Finally, King's suggestion that the Panel's decision conflicts with a prior Second Circuit decision is not a basis for this Court's review as conflicting decisions within the same circuit can be resolved within the circuit.

III. Granting The Petition Would Not Increase King's Benefits

King erroneously assumes that, if the Second Circuit had allowed him to challenge the nonparties' benefit calculations and if it agreed that Pensioner #1's benefit was improperly cut back or that Pensioner #2's benefit was improperly backloaded, King would be entitled to additional benefits because the entire split-rate provision would have to be struck from the Plan. King's mistaken belief is refuted by the text of ERISA which does not require the wholesale invalidation of the split-rate amendment even if it were unlawfully applied to two participants.[5] If, in

5. Unlike other ERISA provisions, ERISA's cut-back rule, Section 204(g)(1), provides that an amendment that reduces any participant's accrued benefit simply cannot be applied to such individuals. 29 U.S.C. § 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or section 4281."). Other sections of ERISA prohibit the amendment entirely. For example, ERISA Section 302(c)(8), an exception to the

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fact, the split rate could not be used to calculate Pensioner #1's benefit given that he returned to Covered Employment prior to 1995, the remedy would be to calculate Pensioner #1's benefit using the higher rate. This result would not affect King's benefit since he did not return to Covered Employment until 1998. Similarly, if Pensioner #2's benefit were backloaded because he satisfied the conditions of the repair and obtained the retroactive increase for all his pension credit, the remedy would be to either eliminate the repair or modify it so that it conformed

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(Cont'd)

cut-back prohibition, expressly stipulates that if certain conditions are not met, the amendment is inoperative as to anyone.

> No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment.

29 U.S.C. § 1082(c)(8).

Similarly, ERISA Section 204(h), which precludes a plan from reducing the rate of future accruals absent advance written notice, explicitly prohibits the amendment without the notice. 29 U.S.C. § 1054(h) ("An applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides the notice described in paragraph (2) to each applicable individual (and to each employee organization representing applicable individuals)"). King's exclusive reliance upon Treas. Reg. § 1.411(d)-3(b), which states that "a plan is not a qualified plan . . . if a plan amendment decreases the accrued benefit of any plan participant. . . .", to support his contrary view is misplaced because the regulation does not state that the amendment could not be applied to any participant. It states that the plan may be subject to disqualification. King is not challenging the Plan's tax qualification, but seeking additional benefits.

to the 133-1/3 percent test. There is no basis for King's proposition that the remedy would be to apply the repair to all participants who return to Covered Employment after an absence without satisfying the conditions of the rule.

IV. The Case Was Correctly Decided

A. King Has No Actionable Injury

King tries to portray his case as sufficiently important to justify review by invoking this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), in which the Court held that lying is inconsistent with ERISA's fiduciary duties. In the first instance, the conduct found actionable in *Varity* (intentionally deceiving employee-participants about the financial security of a newly formed subsidiary and its new benefit plans to induce them to transfer to a worthless company with no long-term ability to provide benefits) in no way compares to the conduct challenged by King (the Joint Board's advising Petitioner, consistent with its interpretation and application of the Plan for more than ten years, that a plan amendment became effective in 1989 and the Joint Board's producing a document drafted in 1995 retroactive to 1989 in response to King's request for a 1992 plan document).

King's argument that the Joint Board's response to his request for a 1992 plan document constitutes a *Varity*-type fiduciary misrepresentation claim also fails because regardless of whether King relied on the alleged misrepresentation — which he admits he did not — he was not injured, even according to his definition of injury (that is, deciding not to sue). Because King did litigate and was

not injured, the underlying purpose of providing a judicial remedy for fiduciary misrepresentations — that is, to put an injured participant in the position he or she would have been in but for the misrepresentation — would not be served here. Petitioner fails to cite, and Respondents are not aware, of a single case in which a participant has prevailed on a fiduciary misrepresentation claim in the absence of any injury, and nothing in *Varity* would excuse the injury requirement for such claims. *Varity*, 516 U.S. at 512 (holding that Section 502(a)(3) offers appropriate equitable relief *"for injuries* caused by violation that § 502 does not elsewhere adequately remedy." [emphasis added]).

Furthermore, the injury that King suggests that a "less litigious" participant could have suffered — choosing not to litigate — is not the type of injury that the Court found actionable in *Varity*. He does not allege that the Joint Board's alleged misleading response in any way affected any action he did or could take to qualify for or obtain benefits, but only looks only at a speculative impact on litigation.

In *Varity*, as in other misrepresentation cases under Section 502(a)(3), the plaintiff has been deprived of a particular benefit by virtue of an alleged misrepresentation. Here, even if the Joint Board's response to King's document request constituted a fiduciary misrepresentation, which Respondents deny, the impact of such a response on the participant's decision whether to sue a plan and its administrator is not the injury sought to be remedied in ERISA misrepresentation cases. As noted in *Sampson v. Rubin*, No. Civ.A. 00-10215-DPW, 2002 WL 31432701, *11 (D. Mass. Oct. 29. 2002), "[t]he goal of ERISA is not to

protect litigants but to assist participants in making informed choices about their [benefit] arrangements." *Id.* (citation omitted).

B. King's View of Standing Would Eviscerate ERISA's Exhaustion Requirement

It is well-settled that, absent very limited circumstances, participants seeking benefits under ERISA plans must exhaust administrative remedies prior to filing suit, and indeed King availed himself of the Plan's administrative appeal process. *See, e.g., Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130 (2d Cir. 2001). In this case, the benefit calculations of Pensioner #1 and Pensioner #2 have not been reviewed in any administrative appeal, but King nonetheless seeks to have the Second Circuit review them in the first instance. King's novel argument that he has standing to challenge for the first time in a federal appeals court the benefits awarded to nonparties who have not challenged their own benefit awards through the Plan's administrative appeal process leads to the anomalous result that only plaintiff-participants would be required to exhaust administrative remedies, and that federal courts could act as substitute plan administrators for challenges raised by litigants as to nonparties. *See Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 117 (2d Cir. 2002) (vacating district court's benefit eligibility determination when plaintiff had not applied to plan for particular type of benefit) ("ERISA . . . provides no authority for a court to render a *de novo* determination of an employee's eligibility for benefits. Therefore, absent a determination by the plan administrator, federal courts are without jurisdiction to adjudicate whether an employee is eligible for benefits under

an ERISA plan. Consistent with this narrow role for federal courts, all of our past decisions presuppose the existence of an eligibility or claim determination on the part of the plan administrator." [internal citations omitted]). The Second Circuit properly did not countenance such a rescission of the exhaustion requirement.

V. The Factual Dispute Over When The Split-Rate Amendment First Applied To The Standard Pension Makes This Case Inappropriate For Supreme Court Review

King's fiduciary breach and cut-back claims hinge on the resolution of a disputed set of facts involving the date the split-rate amendment became applicable to the Standard Pension. Respondents argued on appeal that the District Court erred in accepting King's contention that it did not apply to the Standard Pension until 1995 because the District Court, like King, mistakenly conflated two different Plan amendments adopted in 1989, and that the applicable arbitrary and capricious standard of review under *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), required deference to the Joint Board's interpretation of when the split-rate amendment applied to the Standard Pension. However, in view of its standing determination, the Second Circuit never addressed this issue. (Pet'r App. at 3a). The presence of this unresolved contentious factual dispute over a plan-specific issue makes this case inappropriate for Supreme Court review.

VI. King's Request For Statutory Penalties Does Not Present An Issue For Review

The Petition summarily asserts that this Court should also rule on whether the District Court erred in denying his request for statutory penalties under ERISA Section 502(c), 29 U.S.C. § 1132(c). (Pet. at 24). Notably, King neglected to identify this issue in the "Questions Presented" section of the Petition. Additionally, the Second Circuit did not address this issue, and King does not allege a conflict among the courts of appeals on ERISA's statutory penalty provisions. The question of whether to award statutory penalties under ERISA Section 502(c) is a matter left to the District Court's discretion, and whether that discretion was properly exercised does not warrant this Court's review. In any event, the District Court correctly determined that King was not entitled to statutory penalties given that the Joint Board provided King and his counsel with all documents required under ERISA, and King cites to no case that supports his premise that a disagreement between a plan administrator and a participant regarding the effective date of a plan amendment triggers ERISA Section 502(c) penalties. By the express statutory language, the 502(c) penalties come into play only if a plan administrator fails to produce documents. (Pet'r App. at 37a-40a).

In addition, King's simultaneous attempt to obtain both statutory penalties for an alleged violation of ERISA's disclosure obligations under Section 104(b)(4) and "other equitable relief" under the catchall remedy of ERISA Section 502(a)(3) for the same challenged conduct by the Joint Board overlooks this Court's direction that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in

which case such relief normally would not be 'appropriate.'" *Varity*, 516 U.S. at 515; *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 58 (1st Cir. 2001) (declining to recognize a duplicative claim for a fiduciary breach based on an inadequate SPD, citing the general prohibition that courts "should avoid creating duplicative remedies for violations of ERISA's provisions"); *Watson v. Deaconess Waltham Hospital*, 298 F.3d 102, 105 (1st Cir. 2002) (rejecting fiduciary breach claim based on failure to disclose benefit eligibility information) ("When ERISA itself has specified a duty and corresponding remedy, we will impose a further duty on fiduciaries only in very narrow circumstances." [internal citations omitted]).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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